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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAYO OIL COMPANY AND THE MEADVILLE CORPORATION AND PETROLEUM MARKETING CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

A. Whether gross negligence on the part of the government in causing a pre-indictment delay of eight years deprives the defendants of due process of law where the defendant is actually prejudiced at trial due to the delay.

B. Whether the government's failure to inform the defendants in a antitrust criminal action of the series of acts from which the government contends a conspiracy may be inferred deprives the defendants of their sixth amendment rights to be informed of the nature and cause of the accusation where the government prosecutor stated before trial that said acts would not be at issue.

C. Whether petitioners were deprived of a fair trial in a criminal antitrust case by reason of the trial court's role in creating and issuing to the press prejudicial publicity and the court's subsequent failure to take or permit appropriate remedial action to ascertain the impact of such publicity on the jury.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, hereby petition the Court for a writ of certiorari to review the judgment in a criminal case of the Fourth Circuit Court of Appeals.[1]

[1] Pursuant to *Sup. Ct. Rule* 21 (b), the parties to the proceeding in the Fourth Circuit were: Kayo Oil Company; Society of Independent Gasoline Marketers of America; Amerada Hess Corporation; Ashland Oil Inc., The Meadville Corporation; Petroleum Marketing Corporation; Robert R. Cavin; and the United States.

OPINION BELOW

The opinion in this case filed by the United States Court of Appeals for the Fourth Circuit is reported at 624 F.2d 461 (4th Cir. 1980).[2] A copy of the opinion is contained in the Appendix to this petition. *App. at 1a.*

JURISDICTION

On December 26, 1979, the Fourth Circuit filed an opinion which affirmed petitioners' conviction by a jury sitting in the United States District Court for the District of Maryland for an alleged violation of Section One of the Sherman Act (15 U.S.C. § 1).[3] Petitioner timely filed in the Fourth Circuit a petition for rehearing or in the alternative suggestion for rehearing en banc. The court denied the suggestion for rehearing en banc in its opinion filed on June 24, 1980. *App. at 3a.* With regard to the petition for rehearing, the court again affirmed petitioners' conviction, but reversed the conviction of Ashland Oil, Inc., a defendant in the trial below.[4] *Id.* The government filed a petition for rehearing concerning the reversal of Ashland's conviction, which was denied by the Fourth Circuit on August 5, 1980. Petitioners received an extension of time from the Chief Justice on September 30, 1980 to file the instant petition by October 14, 1980.

The Supreme Court has jurisdiction to review this case by writ of certiorari pursuant to 28 U.S.C. § 1254 (1).

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[2] The Fourth Circuit originally filed an opinion in this case on December 26, 1979, but withdrew that opinion and substituted in lieu thereof the opinion referred to above.

[3] The Fourth Circuit reversed the conviction of Robert R. Cavin, a defendant in the trial below.

[4] In addition, the court modified its opinion regarding the disposition of the appeal of Robert R. Cavin. *App. at* 3a.

STATEMENT OF THE CASE

A. *The Parties And The Market*

Petitioners are three of seven corporate defendants,[5] one association[6] and four individual defendants[7] charged with participation in a conspiracy to fix the retail price of gasoline throughout an area referred to as the Middle Atlantic States ["MAS"][8] between 1967 and 1974.

The corporate defendants in this case were members of the "cut-rate", "unbranded" or "private brand" segment of the retail gasoline market.[9] The other general category that constituted the retail gasoline market was known as the "major brand" segment, e.g. Exxon, Gulf, Texaco. The private brand segment of the market was generally characterized by high volume stations that sold gasoline at a price below that charged by the major brand stations and did not offer any repair services. As private brand marketers, the defendants shared the following character-

[5] Amerada Hess Corporation ["Hess"]; Ashland Oil, Inc. ["Ashland"]; Continental Oil Company ["Continental"]; Crown Central Petroleum ["Crown"]; Kayo Oil Company ["Kayo"], a subsidiary of Continental; The Meadville Corporation ["Meadville"] and Petroleum Marketing Corporation ["PMC"]. Crown and Continental were acquitted by the jury. Ashland's conviction was reversed by the Fourth Circuit.

[6] SIGMA.

[7] Robert R. Cavin; Norman Goldberg; Charles J. Luellen and W. H. Burnap. Cavin was Executive Director of SIGMA from late 1972. Goldberg was Hess' Manager of Gasoline Station Operations until May, 1968, when he was promoted to Vice President. Luellen was an Executive Assistant at Ashland until 1970, when he was promoted to Vice President. Burnap was a Vice President of Continental. All of the individual defendants but Cavin were acquitted by the trial court upon motions for judgments of acquittal during the trial. Cavin's conviction was reversed by the Fourth Circuit.

[8] New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia and the District of Columbia.

[9] Continental was not a member of this segment of the market.

istics common to all private brand marketers: i) their brand names were not advertised; ii) they provided no repair services at their stations; iii) they did not accept credit cards; and iv) their principal marketing tool was the price of their gasoline, which was anywhere from 2¢ to 5¢ per gallon lower than the prices of gasoline sold at major brand stations.[10] At trial, it was established that in order for the private brand marketer to compete with the major brand marketer, it was essential that its gasoline be offered to the consumer at a lower price. If both major and private brands were being offered for substantially the same price, the motoring public would choose to purchase at the major brand station based on name recognition and the extra services offered by that marketer.

In the MAS, the private brand segment of the retail gasoline market held from 5% to 20% of market sales, depending upon the state. The defendants owned or sold to approximately 2% of the total number of outlets in the area and held about 6% of the total retail gasoline sales.[11]

Evidence adduced at trial showed that the MAS was in reality a potpourri of countless markets as opposed to one market. Competition was generated among outlets located within, at most, a three to four mile radius. Pricing charts for representative markets within the area revealed erratic retail pricing which varied widely from market to market, often within the same city. Not only was there extreme pricing volatility among the stations within the

[10] A major brand marketer (such as Exxon or Shell) utilized a different marketing concept in that its brand name was widely recognized due to advertising, it offered repair services, accepted credit cards and placed its marketing emphasis on methods of competition such as service and credit.

[11] These figures exclude Continental as that company does not market at retail in the MAS.

market, but the competitors and prices from market to market were not even remotely similar.[12]

The typical retail gasoline market within the MAS contained a high concentration of major brand stations. The existence of lower priced, high volume, private brand stations created a positive competitive situation for the consumer within the local market, as they were an alternative to the higher price charged by the major brand stations. Because the private brand marketer survived only by charging a lower price for its gasoline, the price at the major brand stations was a "cast iron" ceiling over the price charged at private brand stations. In those markets where there was a high concentration of private brand marketers, e.g., New York Avenue in Washington, D.C., both major and private brand prices were lower than anywhere else in the city.

SIGMA was an association of private brand marketers that represented members throughout the entire United States. The private brand marketers that belonged to SIGMA generally had their stations thinly scattered over a wide geographic area. These marketers, committed to low overhead, could not justify a mammoth field organization to conduct price surveys such as developed by major brand marketers. As such, each company had to make retail pricing decisions from one central location for stations located in widely disparate markets.

As noted above, the "life blood" of a private brand marketing operation was price. A necessity of operation was the possession of current, up to the minute, accurate data on prices and price trends. Because defendants' stations were thinly scattered, their field personnel did not have an overview of what was happening in adjoining

[12] Spot comparisons of prices at differing locations on the same day showed prices ranging from 26.9¢ per gallon to 32.9¢ per gallon.

market areas which could have ripple effects upon them. In addition, their field personnel often sent in false information about price increases in the market as they had a vested interest in keeping prices low and volumes high. Since a private brand marketer operated with an extremely low margin at very high volumes, even a slight error of judgment in current prices in one market could mean that the entire company worked for a full month at a loss.

SIGMA sought to fill the private brand marketers' critical need for current and accurate price information by collecting pricing data from trade papers, press releases, private brand marketers, major brand marketers and other sources. This data was relayed by SIGMA to the private brand marketers so that they would be aware of what was happening in adjoining markets and their own markets. SIGMA saw its pricing surveys as the equivalent of an oral Platt's Oilgram,[13] with its focus of attention being on the private brand sector of the market.

Whether a major announced a restoration in a large area, a small area, or repeatedly announced restorations for several adjoining areas, the independents were primarily interested in what happened at the street level. A price increase by a major oil company would not have an effect until its retail dealers would pass on the price increase to the public as their current inventories of low-cost product ran out. During this interim period,

[13] For at least forty years, the "bible" of the retail gasoline industry was a trade newspaper known as "Platt's Oilgram," published by McGraw-Hill. Platt's conducted regular pricing surveys and published pricing data on markets throughout the United States. Platt's usually carried announcements about changes in wholesale prices by majors. Platt's carried little or no information on private brand marketers. Because conditions varied from street corner to street corner and because the independents were primarily interested in retail changes, Platt's was of limited utility to them.

SIGMA collected data on the impact of wholesale price changes on retail prices. These announcements often led to several calls to the same marketer over a short period of time in order to keep track of rapidly changing events.

Information collected and disseminated by SIGMA was current data, which occasionally included announcements just as Platt's Oilgram did of price changes to take place in the near future.[14] It included both upward and downward price changes. SIGMA considered this information public. Although there were occasions when its information was inaccurate, SIGMA was generally regarded in the industry as a source of reliable data and it took care to preserve this reputation.

SIGMA disseminated information as quickly and as accurately as possible. SIGMA had no expectation that a recipient of information would do anything other than use it as input in making its own marketing decisions.

B. *Events Leading To The Indictment*

The instant case actually originated on November 18, 1968, almost eight years before an indictment was sought by the government, and almost nine years before trial. On that date, George Spencer, a newspaper reporter, tape recorded a meeting that was held by SIGMA. The meeting was open to the public, and the guest speaker was Greg Potvin, majority counsel of the Small Business Committee of the House of Representatives. At the meeting, there were some public remarks made by Howard Teak, the then Executive Director of SIGMA, concerning SIGMA's pricing activities. Mr. Teak died of cancer in 1972, four years prior to the indictment in this case.

[14] Platt's routinely carried announcements of price increases by major oil companies to take place at a future time. Because of limited appeal to its readership, Platt's only occasionally published future announcements by independents.

In late 1968 or early 1969, Spencer delivered either the original or a copy (he was unsure at trial) of the tape recording of the SIGMA meeting to John Waters, a senior attorney in the Justice Department's Antitrust Division. Spencer played sections of the tape for Mr. Waters in which Teak made his statements concerning SIGMA's pricing activities. Spencer also told Waters about the circumstances surrounding the recording of the tape.

Spencer left a copy of the tape with Waters. About one year later, when nothing had occurred, Spencer telephoned Waters to ask if anything had been done about the tape, but was told that no investigation had been initiated by the Justice Department. In mid-1969, Howard Teak and William Cady, another SIGMA official, had a meeting with the Justice Department to discuss SIGMA's activities concerning pricing information. Mr. Cady could not recall which Justice Department attorneys he and Mr. Teak met with, and could not recall the substance of the meeting. He did recall, however, that he and Teak were happy about the meeting and believed SIGMA's activities were lawful. Still, no investigation was begun.

In 1973, one of the defendants acquitted below, Crown, was accused of price fixing in a civil case filed by a private plaintiff in the United States District Court for the District of Maryland. Crown was subsequently found liable in 1975 by Judge Alexander Harvey II. *Phillips v. Crown Central Petroleum Corp.*, 395 F. Supp. 735 (D. Md. 1975). *rev'd in part*, 1977-1 Trade Cas. para. 61, 377 (4th Cir. 1977). According to Judge Harvey in an opinion after the *Crown* case was remanded, his civil proceeding led to the commencement of the grand jury investigation that led to the indictment in this case. *See* 1977-2 Trade Cas. para. 61, 599 at 72, 487 (D. Md. 1977). The grand jury was organized in December of 1974, some twenty months after the civil case was filed.

C. *The Indictment And Pretrial Proceedings*

On June 1, 1976, a one count indictment was returned in the District of Maryland against the twelve defendants mentioned above. In vague and general terms, the indictment alleged a conspiracy to fix prices involving the twelve defendants throughout the MAS over a seven year period. *See App. at 44a.* Essentially the defendants were charged with being in contact through SIGMA at the time of price changes.

The problems facing the defendants due to the indictment's lack of specificity were immense. The geographic area referred to as the MAS contained more than 300 competitors and over 55,000 retail stations. Kayo, with only 126 stations in the MAS had over 1,100 price changes during 1971 alone. The potential number of price changes during an almost eight year period was astronomical.

In addition, although the statute of limitations only covered activities back to 1971, the indictment referred back to 1967. The defendants filed a motion to dismiss the indictment based on the pre-indictment delay since the government had been given the Teak tape in 1968. This motion was denied by the trial court in its opinion of February 11, 1977. *App. at 29a.* The defendants also sought before trial to suppress the Teak tape, which was denied by the trial court.

The first hint given the defendants as to the cause of the accusation of price fixing occurred during a hearing on January 26, 1977 in connection with a motion for additional time to analyze hundreds of thousands of documents turned over to the grand jury by third parties. The defendants informed the trial judge that they had been able to isolate only three price changes that occurred throughout the MAS at any specific time during the period covered by the indictment. The defendants requested more

time to prepare to rebut any allegations of conspiracy concerning localized price changes in any of the local markets within the MAS. The prosecutor vigorously opposed this request, stating:

> You cannot look at a Sherman Act conspiracy in isolation by dissecting and dismembering each little part. . . . [I]f we start this dissecting and isolating of every price in every station throughout every market area within the Mid-Atlantic States, this trial will never come to an end.

The prosecutor represented to the court that the trial would not involve analyzing price changes at various individual stations, and would not involve comparing price changes of defendants' stations located in discrete geographic areas. In light of the prosecutor's remarks, the trial judge denied the request for more time.

The defendants requested a bill of particulars regarding the events the government would rely on to show the existence of the alleged conspiracy. The prosecutor agreed to answer one of the requests, indicating that the alleged conspiracy was a single conspiracy among all the defendants and alleged coconspirators extending throughout the geographic area during the entire period of time. The trial court denied the remainder of the defendants' requests, which sough, *inter alia,* information as to which retail gasoline prices were allegedly fixed.

The defendants subsequently filed a motion for more specifics. At the hearing on this motion on April 15, 1977, the prosecutor once again reiterated that his case would involve evidence of the effect on prices throughout the area. The prosecutor further stated that the evidence in his possession could not supply the itemization requested by the defendants.

Thus, prior to trial, the government stated that it would not or could not identify instances in which the retail price

of gasoline was fixed within the MAS. The prosecutor made it clear that the case would not involve the price changes in the local markets within the MAS. Instead, the defendants were informed that the causes of the charge against them were area-wide price changes such as those referred to above.

D. *The Trial*

There was never any direct evidence in the trial below of an agreement to fix prices. As noted above, the defendants had guessed on the basis of pretrial discovery and some of the exhibits that were designated in a timely fashion before the trial that the government might focus on three national price changes that occurred in November of 1970, July of 1971 and August of 1972. The first half of the prosecutor's case was devoted to proving that a conspiracy could be inferred from these incidents by juxtaposing the defendants' phone records with pricing records that showed price increases at the time of contact. The defendants were prepared for this contention and demonstrated to the jury that these area wide price changes were nationwide, that they had been led by the major oil companies, that the moves of the major companies had been presaged in trade publications, and that the price changes by the defendants were normal responses to certain economic and governmental events, and not the result of any price fixing conspiracy.

It soon became apparent to the prosecutor that he could not rely on the three area-wide instances to imply a conspiracy to fix prices. Thereafter, despite earlier assurances to the contrary, the government sought to show the existence of a conspiracy by circumstantial evidence relating to 19 incidents of price changes in local markets within the MAS. Almost all of these local incidents occurred prior to 1972, and many were before 1971, the limitations period. Due to the prosecutor's assurances

before trial and the trial court's refusal to order the government to furnish a bill of particulars, the defendants had no idea that the government would attempt to use this evidence or evidence of this nature. Indeed, over one hundred exhibits used by the prosecutor in connection with these incidents were not among those turned over to the defendants before trial, a clear violation of the pre-trial stipulation. Objections to the introduction of testimony concerning these local incidents were denied routinely by the trial court.

As the defendants had no knowledge that these 19 local incidents were the cause of the accusation of criminal activity, they were surprised at trial and unprepared to present a defense. The prosecutor sought to prove the existence of a conspiracy by showing price changes in these local markets at the time of telephone contact among the defendants. With regard to 19 localized price changes out of the thousands upon thousands that had occurred during the seven years, the defendants were not prepared to offer evidence rebutting the inference that the prices changed as a result of telephone communications among the defendants.

In addition, the prosecutor was permitted over the defendants' objections to introduce the tape recording into evidence that contained the remarks made by Howard Teak at the 1968 SIGMA convention. This recording was played several times during the government's case, during the government's closing argument and three times during jury deliberations.

After the jury deliberated for a number of days, the petitioners were convicted and fined fifty thousand dollars $50,000.00) each.

E. *The Appeal*

On appeal, the defendants argued that they were not informed of the cause of the accusation against them based

on the prosecutor's shift in mid-trial to evidence of price changes in the local markets within the MAS as opposed to price changes on an area-wide level throughout the MAS. The Fourth Circuit held, however, that evidence of the local incidents was proper consideration for the jury. *App. at 7a-8a.* Nowhere in the court's opinion is it mentioned that the government had represented that this evidence would not be in the case. The court also stated that the defendants had ample notice of the cause of the charge against them, based in large part on its erroneous statement that the defendants had possession of all government exhibits prior to trial. In fact, the government used over 100 exhibits that were not turned over prior to trial in accordance with the pretrial stipulation. Many of these exhibits related to the 19 local incidents of price changes. Although it was clear from the record that these "add-on" exhibits were introduced against the defendants, the Court overlooked this point in its initial opinion. The petitioners raised this point in their petition for rehearing before the Fourth Circuit, and the facts were not disputed by the government. The court, however, did not address this issue in its final opinion and continued to assume erroneously that the defendants received all exhibits thirty days before trial.

The defendants also argued on appeal that the tape recording of the 1968 SIGMA meeting containing Howard Teak's remarks should have caused the indictment to be dismissed and at the very least should not have been admitted into evidence. The Fourth Circuit's opinion did not mention this issue.

WHY THE SUPREME COURT SHOULD ISSUE A WRIT OF CERTIORARI IN THE INSTANT CASE.

A. *Gross Negligence On The Part Of The Government Resulted In An Unreasonable Pre-Indictment Delay Of Eight Years Which Severely Prejudiced The Defendants At Trial And Which Deprived Them Of Due Process of Law.*

One of the center pieces in the government's case was the tape recording of the 1968 SIGMA meeting in which Howard Teak, the then Executive Director of SIGMA, spoke in general terms about SIGMA's role in dispensing price information. The tape was played countless times by the government over the defendants' objections during its case and was played again during closing argument. While deliberating, the jury requested to hear the tape three times.

Prior to trial, the defendants filed a motion to dismiss the indictment based on the inordinate pre-indictment delay. The government never offered an explanation as to why there was a six year delay in investigating this matter and an eight-year delay in seeking an indictment. The trial court denied the defendants' motion on the basis that the defendants had failed to show an improper motivation on the part of the government for the delay. In addition, the trial court ruled that no prejudice had been shown as a result of the delay.[15] The defendants also moved before trial to suppress the tape, but this motion was denied.

While the sixth amendment protects an accused from delays between indictment and trial, the Court has recognized that the due process clause of the fifth amend-

[15] On appeal, the defendants maintained that the Teak tape at the very least should not have been admitted in evidence because *inter alia,* of the pre-indictment delay. The Fourth Circuit failed to address this issue in its opinion.

ment has a role to play in protecting an accused from delays prior to an indictment. *United States v. Lovasco,* 431 U.S. 793 (1977); *United States v. Marion,* 404 U.S. 307 (1971). The Court noted in *Marion* that the statute of limitations protects a defendant from the *possible* prejudice that might result from a delay between commission of a crime and an arrest or indictment. 404 U.S. at 322. It is a deprivation of due process where there is an unreasonable delay prior to an indictment that *actually* prejudices the defendant. *Id.* at 324.

In *Lovasco,* the Court stated that proof of actual prejudice "is generally a necessary but not sufficient element of a due process claim. . . . " 431 U.S. at 790. To complete a due process inquiry into pre-indictment delay, the Court stated that the reason for the delay must be considered by the Court. *Id.* The Court in *Lovasco* accepted the trial court's conclusion that actual prejudice resulted from a delay of eighteen months, but held that a prosecutor's decision to delay in seeking an indictment so as to investigate the matter further did not amount to a deprivation of due process.

With regard to the second element set forth in *Lovasco,* the reason for the delay, the circuits have split as to whether the delay must be intentional as opposed to negligent and what sort of reason or purpose behind the delay must be shown to amount to a due process violation. Some courts have held that the defendant must show that the delay was intentional for an improper purpose such as to give the government a tactical advantage or to harass the accused. *See, e.g., United States v. Comosona,* 614 F.2d 695, 697 (10th Cir. 1980); *United States v. Cerrito,* 612 F.2d 588, 593n.3 (1st Cir. 1979); *United States v. Stinson,* 594 F.2d 982 (4th Cir. 1979); *United States v. Ramos,* 586 F.2d 1078, 1079 (5th Cir. 1978); *United States v. Matlock,* 558 F.2d 1328, 1330 (8th Cir.), *cert. denied,* 434 U.S. 872 (1977). Other courts have held that the defendant need not

show that the government acted intentionally with a bad purpose but can meet the test by showing negligence on the government's part. *See, e.g., United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977); *United States v. Barket*, 530 F.2d 189, 195 (8th Cir.), *cert. denied*, 44 USLW 3329 (1976). *See also United States v. Jessee*, 605 F.2d 430, 431 (9th Cir. 1979) (culpable). *Cf. Barker v. Wingo*, 407 U.S. 514, 531 (1972).[16] The courts in these latter cases speak in terms of whether the delay was "unreasonable" and not intentional, and, relying on the language in *Marion* calling for "a delicate judgment based on the circumstances of each case", 404 U.S. at 325, balance the actual prejudice against the reasons for the delay. *See, e.g., United States v. Rubin*, 609 F.2d 51, 66 (2d Cir. 1979), *cert. granted on other issues*, 100 S. Ct. 1645 (1980) (emphasis added);[17] *United States v. King*, 593 F.2d 269, 272 (7th Cir. 1979); *United States v. Mays, supra*, 549 F.2d at 677; *United States v. Barket, supra*, 530 F.2d at 193. The fact that the delay might be the result of negligence as opposed to intentional conduct with a bad purpose is merely factored into the weighing process. *United States v. Mays, supra*, 549 F.2d at 677.

The trial court in the instant case ruled that the delay must be the result of intentional conduct on the part of the government done for a bad purpose. *App. at 35a.* Using such a stringent standard, a defendant in a criminal trial may be severely prejudiced at trial by a stale prosecution but have no recourse because the government's conduct was not evil but grossly negligent.

[16] The view that negligence on the part of the government as opposed to intentional conduct to gain a tactical advantage is sufficient to make out a due process claim seems to be supported by the Court in *Lovasco*. The Court noted with approval the government's concession that reckless disregard on the part of the government would be enough. 431 U.S. at 795n.17.

[17] The petitioner in *Rubin* did not raise the pre-indictment delay issue before the Court.

In the instant case, the defendants cannot demonstrate that the eight year delay on the part of the government prior to the indictment was intentionally done to gain a tactical advantage at trial. The government has never advanced any reason for the delay.[18]

The circumstances surrounding this case lead to the inescapable conclusion that the pre-indictment delay was the result of gross or culpable negligence on the government's part. It was uncontroverted at trial that the tape was delivered to and played in the presence of John Waters, a senior government attorney in the very department charged with enforcing the antitrust laws. *See* note 24 *infra*. The reporter who delivered the tape, George Spencer, was a knowledgeable source whose business it was to report on the oil industry. Spencer recontacted Waters approximately one year later to determine what if anything had been done about the tape.

Shortly after the government received the tape, the government was contacted by Howard Teak, and officials of the Justice Department met with Mr. Teak and another SIGMA official, Mr. Cady. Presumably, the SIGMA representatives and the Department of Justice personnel spoke about SIGMA's activities with regard to price information.[19] Thus, the Justice Department was advised a

[18] In United States v. Harmon, 379 F. Supp. 1349, 1351 (D.N.J. 1974), the court held that the government's failure to offer a satisfactory reason for pre-indictment delay gave rise to an inference that the purpose was to gain a tactical advantage.

[19] Unfortunately the testimony of Mr. Cady showed the effects of the passage of almost nine years (as of the trial date), in that he was unable to remember the date or exact place of the meeting, the names of the persons present, or the exact matters discussed. It was revealed during this testimony, however, that Teak was the person who really knew about the details of the meeting, and had the names of the justice department personnel with whom they had met. Although Mr Cady testified that when he and Howard Teak left the meeting with the Justice Department officials,"we went back to the hotel and sought out

third time of facts which, it contended a trial almost eight years later, amounted to an illegal conspiracy to fix prices.[20]

On April 3, 1973, over four years after the Teak tape was delivered to the Justice Department, one of the defendants in the trial below, Crown, was accused of, *inter alia,* price fixing in the United States District Court for the District of Maryland. Thus, on a fourth instance, the government had notice of alleged illegal activity on the part of the defendants but did nothing until December of 1974 when the grand jury was organized.

The indictment of the defendants for the alleged conspiracy was returned on June 1, 1976. This was over three years after the same conspiracy was alleged in a civil case in Maryland; approximately six and one-half years after Spencer telephoned the Antitrust Division to find out if it had taken any steps concerning the conspiracy that he believed was evidenced by the Teak tape; and approximately seven years after Howard Teak and William Cady met with the Antitrust Division to discuss SIGMA's pricing activities. It was almost *eight years* after the tape was played for and given to the Antitrust Division.

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our friends and fellow members of SIGMA who happened to be staying there and told them of our exhilaration and feelings about the results of the meeting . . . ", he was unable to recall the details of the meeting with sufficient clarity to convey adequately to the court why he and Mr. Teak were satisfied with the results of the meeting.

[20] Particularly significant in this regard is that the Court's decision in United States v. Container Corporation, 393 U.S. 333 (1969) was issued at almost the precise time that the Teak tape was given to the Antitrust Division. This case raised serious and substantial antitrust questions concerning the pricing activities of organizations such as SIGMA. This should have been an additional factor in sparking an investigation of SIGMA's activities, which the government knew of as a result of the tape and the Teak visit. Teak met with the Justice Department as a result of the *Container* decision.

The length of delay in the instant case is considerably longer than the statute of limitations itself. Because the crime alleged was a conspiracy, however, the prosecution was permitted to introduce the Teak tape and much of the other evidence it presented, all of which were outside the statute of limitations. Thus, the statute of limitations, the primary protection against pre-indictment delays as seen by the Court in *Marion*, 404 U.S. at 322-24, was of no avail to the defendants. By their own lack of diligence, the government was able to deprive the defendants of the protection offered by the statute of limitations. As stated by a trial judge upon dismissing an indictment due to pre-indictment delay:

> [N]o citizen of the United States should be required to answer in a criminal courtroom to charges that are [as] stale as these charges with conspiracy as broad in scope as has been charged here. And to compel such a trial is a denial of the constitutional rights of the accused.

United States v. Glist, 594 F.2d 1374, 1377 (10th Cir. 1979).

It would seem obvious that a delay of eight years shows on its face a reckless disregard for the defendants' ability to mount an effective defense. But the rule applied by the trial judge in the instant case and by some other judges in the cases cited above, that is that the defendants must show intentional conduct on the part of the government to gain an advantage at trial, foreclosed the defendants from securing any relief.

Moreover, the prejudicial effect on the defendants as a result of the eight year delay was severe at trial. First and foremost, as noted above, the speaker on the tape, Howard Teak, died in 1972, fully three years after the Antitrust Division had the tape of his remarks, but still some two years before any investigation was begun by the govern-

ment. With the loss of Mr. Teak, defendants were left without the primary means to refute or defend against one of the government's primary pieces of evidence. They could not explain what Teak actually meant or bring to his sometimes incoherent and always ambigious remarks some kind of clarity. Mr. Teak's death deprived the defendants of the opportunity to cross examine the man who, considering the prominence given his remarks on the tape by the prosecutor, was the government's star witness.[21] Incredibly, however, other witnesses were permitted to testify as to what Mr. Teak meant by his remarks.

The loss of Mr. Teak also deprived the defendants of their ability to investigate adequately the meeting he had with Justice Department attorneys. This meeting led Mr. Teak to tell all who would listen that his and SIGMA's activities were legal.

In addition to the loss of Teak, the delay of over eight years resulted in the deaths or disabilities of at least eight other persons who were intimately involved during the relevant time period in the activities which were the subject of the trial. As SIGMA was the alleged hub of the conspiracy, Teak, the Executive Director, was a critical witness. These other persons included: three former directors of SIGMA, a former President of SIGMA, a former Vice President of SIGMA, a former secretary-treasurer of SIGMA and two former Presidents of companies which figured prominently at trial.[22]

[21] Because Mr. Teak's death was not a sudden one, but was the result of a gradually terminal cancer over a period of years, the defendants could have taken appropriate steps to preserve his testimony if the government had timely begun its investigation.

[22] The loss of these persons to the defense preparation is analogous to the loss of records and memories referred to by the Court in Barker v. Wingo, 407 U.S. 514 (1972), which could not be accurately measured because "what has been forgotten can rarely be shown." *Id.* at 532.

In addition to the loss of important witnesses, the government's inexcusable delay resulted in many of the defendants' business records being lost through the normal course of the defendants' document retention plan. When the government switched in mid-trial and sought to show that a conspiracy could be inferred as a result of price changes that occurred in 19 local markets within the MAS, many of which occurred eight years and more before trial, the defendants were often faced with circumstantial proof concerning matters for which the defendants had no records.[23]

Despite the blatant unfairness of an eight year delay, the trial court denied the defendants' motion to dismiss the indictment or suppress the tape. Indeed, the trial court

[23] For example, the prosecution developed a highly questionable chain of circumstantial facts which it claimed proved the existence of a conspiracy to raise prices on Harford Road in March 1968 (more than three years before the period reached by the statute of limitations). This market included at least 18 stations, eight of which were private branded stations, three of which belonged to the defendants. A fourth station was operated by Fisca, an alleged co-conspirator. Using records of a series of telephone calls on March 25, 1968, pricing data for stations which were not even in the Harford Road competitive area, and a generalized Crown market report which referred to a group of "independents" located in "East Baltimore", the prosecution claimed that prices in Harford Road were stabilized in March, 1968. Defendants were thus confronted by a circumstantial presentation of technical evidence which depended on juxtaposition of schedules of telephone calls with no particular geographic area, generalized references to specific markets, and isolated records, when they had no complete records of their own with which to combat it. Moreover, since even the prosecution witnesses could not testify as to the substance of these telephone calls, the government was able, by virtue of its delay, to orchestrate an array of technical evidence which was irrebuttable because of that delay. Further, the government was allowed to present its material forcefully while at the same time arguing that the inability of defense witnesses to recall was evasion.

permitted wholesale use of the Teak tape.[24] The basis for the court's ruling was the standard that has been adopted by some of the circuits requiring that the government act intentionally and with a bad purpose before any claim of pre-indictment delay can be sustained. Other circuits have recognized that due process protects an accused from pre-indictment delay even where the government's negligence brings about the prejudice to the defendants. Petitioners submit that violations of constitutional rights should be measured in terms of prejudicial effects rather than in terms of whether the violations were deliberate. Given the prejudice that resulted in the instant case due to an eight year delay, the Court should grant certiorari to clarify the standards set forth in *Lovasco* and *Marion*.

B. *A Failure On The Part Of The Government To Inform The Defendants In An Antitrust Criminal Action Of The Series Of Acts Which The Government Contends Shows A Conspiracy Deprives The Defendants Of Their Sixth Amendment Right To Be Informed Of The Nature And Cause Of The Accusation. Where The Government Prosecutor Stated Before Trial That Said Acts Would Not Be At Issue.*

The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . . " The requirement that an accused be informed of the nature and cause of the accusation of criminal activity has been said by the Court to be "the first and most universally recognized requirement of due process." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941).

[24] In its memorandum opinion, the court stated that "John Waters apparently never listened to the Spencer [Teak] tape." App. at 37a. However, Spencer's testimony was uncontroverted that he played the tape for Mr. Waters when he first delivered it in late 1968 or early 1969.

The standard set forth in the sixth amendment demands more than merely identifying the crime and informing the accused that he has been charged with a violation of the crime. To meet the sixth amendment standard, the accused must be informed of the charge against him to the extent that he may prepare a defense and not be taken by surprise at trial, as well as be able to plead double jeopardy to a latter prosecution for the same offense. *Russell v. United States,* 369 U.S. 749, 763 (1962); *Berger v. United States,* 295 U.S. 78, 82 (1935); *Wong Tai v. United States,* 273 U.S. 77, 80 (1927); *Rosen v. United States,* 161 U.S. 29, 34 (1896). *United States v. Simmons,* 96 U.S. (6 Otto) 360 (1878). The test is whether the accused has been informed of the charge to the extent that he will not be misled when preparing his defense. *Hallman v. United States,* 208 F.2d 825, 827 (D.C. Cir. 1953). *See also Smith v. O'Grady,* 312 U.S. 329, 334 (1941); *United States v. Brozyna,* 571 F.2d 742, 746 (2d Cir. 1978); *Mayer v. Moeykens,* 373 F. Supp. 649, 654 (D. Vt. 1973), *aff'd,* 494 F.2d 855 (2d Cir.), *cert. denied,* 417 U.S. 926 (1974).

This basic sixth amendment protection afforded to accuseds is lacking in the criminal antitrust area. The Court has held that the combination or conspiracy to restrain trade may be inferred from a course of dealing among the alleged co-conspirators. *American Tobacco Co. v. United States,* 328 U.S. 781, 809-10 (1946). The Court has further recognized that agreements to restrain trade "are seldom capable of proof by direct testimony, and may be inferred from the things actually done . . . " *Eastern States Retail Lumber Dealers' Association v. United States,* 234 U.S. 600, 612 (1914). As noted by the district judge in *United States v. Greater Syracuse Board of Realtors, Inc.,* 438 F. Supp. 376, 380 (N.D.N.Y. 1977), most antitrust action are presented by the use of circumstantial evidence that involves proof of overt acts. *See also United States v. Tedesco,* 441 F. Supp. 1336, 1340 (M.D. Pa. 1977).

Despite the fact that a Sherman Act violation is generally shown by evidence of "the things actually done", the offense is founded upon the conspiracy or the agreement among the defendants. *Nash v. United States*, 229 U.S. 373 (1913). The essence of the crime then is the agreement and not "the things actually done." *See Iannelli v. United States*, 420 U.S. 770 (1975). Pursuant to this principle, courts have held that an indictment alleging a Sherman Act violation need not aver any overt acts. *See, e.g., United States v. Greater Blouse Skirt and Neckware Contractors' Association*, 177 F. Supp. 213, 220 (S.D.N.Y. 1959). Instead, the typical defendant in such a case is told that he must resort to a request for a bill of particulars. *See, e.g., United States v. Tedesco*, 441 F. Supp. 1336, 1341 (M.D. Pa. 1977); *United States v. Greater Syracuse Board of Realtors, Inc.*, 438 F. Supp. 376, 380-81 (N.D.N.Y. 1977). However, the granting of a bill of particulars has long been held to rest solely in the discretion of the trial court, *see, e.g., Rosen v. United States*, 161 U.S. 29 (1896), and it has been held that the prosecution need not furnish a bill of particulars in a criminal antitrust action setting forth the series of acts from which the prosecutor claims a criminal conspiracy may be inferred. *See, e.g., United States v. General Electric Co.*, 40 F. Supp. 627, 632-33 (S.D.N.Y. 1941); *United States v. General Petroleum Corporation of California*, 33 F. Supp. 95, 97-98 (S.D. Calif. 1940).[25]

The hardship and prejudice visited upon a defendant in a criminal antitrust case by the above-stated principles can be observed in the instant case. Here, the indictment set forth vague, general and conclusory allegations of a price fixing conspiracy involving a large number of actors over a considerable length of time in a large area of the country that did not constitute one market but in reality

[25] Interestingly, the defendant in *Nash* was furnished a bill of particulars.

contained thousands of markets. From this the defendants perhaps knew the *nature* of the accusation, but had no idea as to the *cause* of the accusation. There was no direct evidence of an agreement to fix prices and there was no direct evidence as to the substance of conversations among the defendants at the time of price changes that would show an agreement to fix prices. Instead, the prosecutor sought to prove his case by showing that at the time of these contracts, there were changes in the price of gasoline at the defendants' stations from which the jury could infer the existence of a conspiracy.

Given these circumstances, the question of which prices were claimed to have been fixed became critical to the defendants in their preparation for trial. Prior to trial, the defendants were informed that the cause of the accusation that they fixed prices throughout the MAS was the contact among the defendants at the time of area-wide price increases. During the first half of the trial, the prosecutor showed the fact of contact among the defendants during November, 1970, July, 1971 and August, 1972 and the fact that there were price changes at defendants' stations throughout the MAS area during these months.[26] However, because the defendants were informed that the causes of the accusation were the area-wide changes, the defendants were able to prepare their defense, meet the evidence and rebut the inference that these price changes were the result of a conspiracy to fix prices.

The second half of the trial, however, presented a far different picture. When it became evident to the prosecutor that he could not create the inference of any conspiracy concerning the area-wide changes, he dramatically shifted his case to present evidence concerning 19 local incidents where there were price changes, despite his assurances that the trial would not involve the examination of prices

[26] There was not evidence, however, that these changes were uniform, or even that they occurred at the same time.

in the localized market areas within the MAS. Approximately 100 of the exhibits used by the prosecutor concerning these local incidents had not been designated prior to trial as required by the pretrial stipulation.[27] During closing argument, the prosecutor vividly referred to these local incidents as showing the existence of a conspiracy. Because the defendants had been misled as to the cause of the accusation, they were not able to prepare a defense to meet the evidence and rebut the prosecutor's claims of conspiracy. In short, the defendants were not informed of the *true* cause of the accusation.

The Fourth Circuit stated that even if the court were to accept the defendants' arguments that the three area-wide changes were the results of economic forces in the market place and not the result of any price fixing agreement, the evidence relating to local market incidents would still be legally sufficient to support the jury's verdict. *App.* at 7a-8a. However, as seen from the above, the government consistently represented that local price changes would not be a part of the trial. Moreover, the exhibits concerning these incidents were not turned over before trial as promised. The point is that the defendants were not informed that these local incidents were the cause of the accusation in the indictment. Indeed, they were told the contrary. The fact that they could be probative evidence of the conspiracy is irrelevant.

The Fourth Circuit found that the defendants were adequately informed of the charge against them relying on the indictment, the government's answer to the bill of particulars, and the pre-trial stipulation, which required the government to turn over to the defendants copies of all intended trial exhibits before trial, all available *Brady* material, all documents subpoenaed from and voluntarily

[27] The government's promise to deliver intended trial exhibits to the defendants prior to trial was one of the reasons that the trial court denied the defendants' requests for particulars.

turned over by third parties, a list of intended witnesses and all Jencks Act materials. *App. at 9a.* None of these materials, however, in anyway indicated that the cause of the accusation against the defendants was localized price changes in the local markets within the MAS, much less the 19 incidents relied upon at trial. The one step that might have informed the defendants that the 19 local incidents were the cause of the accusation was if the government had turned over the exhibits it eventually used in connection with these local incidents as promised in the pretrial stipulation. The government failed to do this, however, and the result was that the defendants were given no indication before trial as to the cause of the accusation of price fixing.[28]

[28] After the incorrect assertion that copies of all trial exhibits were received by the defendants prior to trial, the Fourth Circuit cited United States v. Schembari, 484 F.2d 931 (4th Cir. 1973) in support of the proposition that the defendants had adequate notice of the charge. In *Schembari,* the defendant was charged with disorderly conduct as a result of his breaking through police lines during a demonstration at the Pentagon. In affirming the trial court's denial of a motion for particulars, the court noted that the prosecution had turned over its entire file to the defendant.

Initially, defendants would note that the prosecution here did *not* turn over its entire file before trial, as over 100 exhibits were used at trial which were not given to the defendants as required by the pretrial stipulation. Moreover, in *Schembari,* the defendant knew the date, place and events that were the cause of the accusation. Here, the defendants had *no* particulars that would suggest the cause of the accusation.

In view of the prosecutor's shift in this case and the fact that more than 100 exhibits were not turned over as required by a formal pretrial stipulation and Order, United States v. Flom, 558 F.2d 1179 (5th Cir. 1977), lends more guidance than the *Schembari* case. In *Flom,* an antitrust case involving the allocation of contracts for sales of re-inforcing steel bars, the government represented in its bill of particulars that no evidence of particular contracts could be offered because it had no such evidence in its possession. The government apparently made similar representations at a pretrial hearing. The court ruled that the defendants were entitled to rely on the bill of

In *Sutton v. United States*, 157 F.2d 661, 669 (5th Cir. 1946), the court noted:

> Every defendant in a criminal case has the right to be informed of the essential factual elements of the offense sought to be charged. The [s]ixth [a]mendment guarantees it. To withhold essential facts that are required to describe the accusation with reasonable certainty is to deny full information of the nature and cause of the accusation.

Here, essential facts were withheld from the defendants that were required to describe the accusation with reasonable certainty. It was not until the second half of the trial that the defendants learned that the causes of the accusation against them were 19 price changes in local markets, out of countless price changes in thousands of markets. Given these circumstances, the defendants were deprived of their sixth amendment rights to be informed of the nature and cause of the accusation.

Generalized allegations of a conspiracy do not supply information as to the cause of an accusation of antitrust illegality where the government's case at trial is based on specific incidents of conduct from which it maintains the jury can infer a conspiracy. The offense of conspiracy is admitted by the law to be vague, yet the same law permits the government to give less detail to the accused to defend against the charge. The Court should grant certiorari in this case to assure that defendants charged with an illegal conspiracy under the Sherman Act are afforded the same sixth amendment rights given other criminal defendants.

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particulars until validly amended, and that it was reversible error for the lower court to have admitted evidence of specific allocated contracts. 558 F.2d 1182, 1185-86. As noted by the court, "[w]ith no notice in writing or in open court before the jury entered the picture, this maneuver was basically unfair and highly prejudicial." *Id.* at 1186.

C. *Petitioners Were Deprived Of A Fair Trial By Reason Of The Trial Court's Role In Creating and Issuing To The Press Prejudicial Publicity And The Court's Failure To Take Or Permit Appropriate Remedial Action To Ascertain The Impact Of Such Publicity On The Jury.*

Petitioners adopt the argument regarding this issue made by Amerada Hess Corporation, a defendant and appellant below, in its Petition For A Writ Of Certiorari filed on the same date as the instant petition.

CONCLUSION

For the reasons stated above, the Court should grant certiorari in the instant case.

Respectfully submitted,

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APPENDIX

United States of America, Appellee,

v.

Society of Independent Gasoline Marketers of America, Appellant.

United States of America, Appellee,

v.

Amerada Hess Corporation, Apellant.

United States of America, Appellee,

v.

Ashland Oil, Inc., Appellant.

United States of America, Appellee,

v.

Kayo Oil Company, Appellant.

United States of America, Appellee,

v.

The Meadville Corporation, Appellant.

United States of America, Appellee,

v.

Petroleum Marketing Corporation, Appellant.

United States of America, Appellee,

v.

Robert R. Cavin, Appellant.

Nos. 77-2515 to 77-2521.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 9, 1979.
Decided December 26, 1979.
Upon Rehearing June 24, 1980.

Before FIELD, Senior Circuit Judge, and WIDENER and HALL, Circuit Judges.

FIELD, Senior Circuit Judge:

On June 1, 1976, an indictment was returned in the District of Maryland against The Society of Independent Gasoline Marketers of America ("SIGMA"), Amerada Hess Corporation ("Hess"), Ashland Oil, Inc. ("Ashland"), Continental Oil Company ("Continental"), Crown Central Petroleum ("Crown"), Kayo Oil Company ("Kayo"), The Meadville Corporation ("Meadville"), Petroleum Marketing Corporation ("PMC"), Robert R. Cavin ("Cavin"), Norman Goldberg ("Goldberg"), Charles J. Luellen ("Luellen") and W. H. Burnap ("Burnap"). The indictment, drawn in one count, charged that the defendants had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, prior to its 1974 amendments, by engaging in a conspiracy to fix prices for the retail sale of gasoline in unreasonable restraint of commerce.

After extensive pretrial proceedings, the trial commenced on May 2, 1977, and at the conclusion of the Government's case the district court granted the motions of three of the individual defendants, Luellen, Goldberg and Burnap, for judgments of acquittal. The trial continued as to the remaining defendants, and on August 30, 1977, the jury returned verdicts of not guilty with respect to Crown and Continental and guilty as to SIGMA, Hess, Ashland, Kayo, Meadville, PMC and Cavin.[1] Judgments of

[1] Cavin was employed by SIGMA in January of 1972 and was appointed Executive Director of the Society in November of that year.

conviction were entered pursuant to the jury's verdicts and the convicted defendants have appealed.

In an opinion filed December 26, 1979, the panel unanimously affirmed the convictions of all of the defendants except Ashland. Similarly, the panel unanimously reversed the conviction of Cavin. With respect to Ashland, a majority of the panel affirmed the conviction, Judge Widener dissenting. Petitions for rehearing and rehearing en banc were filed, and upon the suggestion that the case be reheard en banc less than a majority of the judges in regular active service voted in favor thereof. Accordingly, rehearing en banc is denied. On the petitions for rehearing, however, a majority of the panel are now of the opinion that the conviction of Ashland must be reversed. Additionally, the panel is of the opinion that our disposition of Cavin's appeal must be modified. To that effect, we withdraw our prior opinion and file the present opinion in lieu thereof.

I.

During the period covered by the indictment, and for many years prior thereto, gasoline was sold to motorists through essentially two different types of retail service stations. "Major brand" stations sold the gasoline of major companies, e.g., Exxon, Texaco, Gulf, etc., and in many instances were operated by dealers who were not employees of the major companies. These stations bore brand names that were widely advertised and sold brand name products, including tires, batteries and parts. Many of them offered repair service and accepted recognized company credit cards. "Private brand" stations, on the other hand, offered gasoline under names which were not widely advertised, e.g., Redhead, Kayo, Scatt, etc., and were usually manned by individuals who worked directly for the company which owned the stations. Private brand stations ordinarily offered few products other than gasoline, and spent little money, if any, for media advertising.

With these differences in service, such stations competed with the major brands almost exclusively upon the basis of price. The private brand stations attracted customers from the majors by pricing their gasoline several cents a gallon below that of the major brand stations in the same locale, and as a result the price of major brand gasoline imposed a "ceiling" on private brand prices. In other words to be competitive the private brand retailer was required to maintain a sufficiently attractive "differential" between his price and that of the majors. Because they were selling gasoline at less than that charged by the majors, the profit margin of the private brand stations was reduced to a marginal level, and the volume of a private brand's sales was vitally important. In the highly competitive private brand market volume was, of course, significantly related to price. As a result, the private brand company, in the operation of a local station, took into account in pricing its gasoline from day-to-day not only the price charged in that locale by the major brand stations, but the prices charged by other independents in the same market.

During the period in question the companies which operated private brand stations had available a certain amount of current and accurate data relative to pricing patterns in the major brand gasoline market from a publication known as "Platt's Oilgram". This established trade newspaper conducts price surveys of the majors and publishes such pricing data for major brand markets throughout the country, including advance announcements of upcoming wholesale price moves by the majors. Much information, however, which was vital to the private brand companies could not be gleaned from Oilgram. Oilgram carried little news of major brand retail price behavior on a station-by-station or "street-basis," and such information was highly important to the private brand companies since their competitive vitality depended upon the ability of their individual retail outlets to undercut at all times the prices charged by neighboring major brand stations. More significantly, Oilgram carried practically no news concerning other private brand retailers' price

behavior, either present or future, nor any analysis of the potential impact of major brand market behavior upon the private brand market.

In part to fill this void, the private brand retailers formed a trade association called The Society of Independent Gasoline Marketers of America ("SIGMA"). SIGMA's members were firms and individuals operating private brand stations in various parts of the country. Its board of directors and officers were elected from the membership and its day-to-day operations were managed by a full-time salaried director and his supporting staff. Ordinarily the membership met in convention on a semi-annual basis. SIGMA was characterized at trial by the defendants as an "oral Platt's Oilgram" for independents. It collected information from various sources (including telephone calls to and from private brand companies in which the companies would discuss upcoming market decisions), and it would relay such information to its members, usually by telephone. Information provided by SIGMA to its members included the behavior of independents and majors in adjoining markets, the impact of wholesale prices on retail price structures, upcoming price moves by other independents, opportunities for increased prices or the perceived need for decreases, and generally such other data which might be of assistance to the members in meeting their competition.[2]

The indictment charged that the defendants, in effectuating the conspiracy to fix prices, "used SIGMA as a clearing house for gasoline pricing information in order to coordinate price increases and to eliminate discounting and settle pricing disputes," and that they "met at the occasion of SIGMA meetings and discussed pricing strategy, including the coordinated increase of retail gasoline prices and the curtailment and elimination of

[2] SIGMA also lobbied on behalf of its members, conducted public relations programs, and informed members of adoption and interpretation of government regulations. It is, of course, conceded that none of these activities were germane to the charges in the indictment.

price cutting and discount practices". The indictment alleged that this use of SIGMA, supplemented by telephonic or other contact between the several defendants with respect to coordinated price increases and agreements, had resulted in the stabilization of artificial and noncompetitive prices of gasoline, the effect of which was to restrain competition among the defendants and their co-conspirators.

II.

In their joint brief the defendants make the prefatory charge that they "were convicted of criminal price fixing for exchanging information on prices," and assert that no conviction has ever been sustained on such evidence in a highly competitive market of which the participants had a relatively minimal share. In making this contention the defendants draw heavily upon the Supreme Court's recent decision in *United States v. U. S. Gypsum Co.*, 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978). *Gypsum* involved the practice of inter-seller price verification, a practice which is not, in itself, unlawful *per se*. The Government contended that such an exchange of price information was violative of Section 1 of the Sherman Act if it had either the purpose or the effect of stabilizing prices. The Court held, however, that an effect on prices, without more, would not support a criminal conviction, and that it was necessary to show that such a consequence was intended by the alleged participants.

[1] There is a marked difference between the case before us and the one considered by the Court in *Gypsum*. Here the indictment charged the defendants with a conspiracy to fix prices, and the "exchange of information" was merely one of the activities by which the alleged agreement was effectuated. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811, 844, 84 L. Ed. 1129 (1940). Since in

a price-fixing conspiracy the conduct is illegal *per se*, further inquiry on the issues of intent or the anti-competitive effect is not required. The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *United States v. Trenton Potteries*, 273 U.S. 392, 397, 47 S. Ct. 377, 379, 71 L. Ed. 700 (1926).

III.

[2] The principal challenge of the defendants is that the Government failed to offer sufficient evidence to prove the conspiracy which was charged in the indictment. The indictment defined the geographical area of the conspiracy as the "Middle Atlantic states" of New York, Pennsylvania, New Jersey, Delaware, Maryland and Virginia, as well as the District of Columbia. The defendants maintain that it was necessary for the Government to demonstrate a single continuing conspiracy to fix gasoline prices *throughout* the entire Middle Atlantic region, and contend that the only evidence of the area-wide coordination of price moves related to general increases in November, 1970, July, 1971, and August of 1972. The defendants acknowledge that there were area-wide increases on those occasions, but assert that the evidence failed to show that they were the result of any price-fixing agreement. On the contrary, they suggest that the evidence clearly showed that the price moves on these three occasions were the result of economic forces at work in the market place over which the defendants had no possible control.

The defendants argue that other than those three occasions, the Government's evidence, at best, proved nothing but a series of "local and isolated indictments occurring within the Middle Atlantic states, involving some of the defendants and co-conspirators at different, and shorter, periods of time." Even if we were to accept the defendants' criticism of the probative quality of the evidence on the three area-wide increases, we think the Government's evidence with respect to the various local

markets was proper for the consideration of the jury. Under the indictment the conspiracy embraced an agreement not only to fix prices on an area-wide basis, but also to establish prices in local markets within the region and to effectuate price changes on a coordinated basis. The Government's evidence of the single conspiracy implemented in this manner was not merely circumstantial in nature. The Government's witnesses, many of whom were employed by the corporate appellants, testified concerning the nature and intent of their pricing communications, and their testimony was augmented in many respects by the contemporaneous records of the defendants. Our review of the record pursuades us that the evidence was sufficient to support the conclusion of the jury that the defendants were working together for the accomplishment of their common purpose to fix prices within the geographical area described in the indictment.

We are further of the opinion that the court's instructions to the jury were consistent with the indictment. The court instructed the jury that the defendants were charged with a "single, continuing conspiracy" to fix prices of gasoline in the Middle Atlantic states and, adverting to the evidence with respect to local pricing incidents, emphasized that "if you find that a defendant engaged in isolated incidents of gasoline price fixing, but was not a party to a single overall conspiracy covering the six-state area and District of Columbia area, you must find that defendant not guilty of the matters charged in the indictment." This language, we think, made it crystal clear to the jury that their consideration of the evidence should be addressed to the ultimate issue of a single overall conspiracy.

IV.

[3] Defendants also claim that there was a fatal variance of proof from the original indictment, the bill of particulars, and the pre-trial stipulation of the parties. Much of what we have said with respect to the sufficiency of the evidence applies equally to this contention of the

defendants which, in a large degree, is predicated upon their argument that the indictment required a showing of continuous area-wide price manipulation. As we have noted, there was substantial evidence to support the jury's finding of guilt and, assuredly, the defendants were not convicted upon a charge that was not specified in the indictment, nor were they uninformed of the charge against them. Additionally, the charges and specifications found within the four corners of the indictment, the bill of particulars, and the pre-trial stipulation not only informed the defendants of the charges against them, but are sufficiently clear to allow the defendants to assert double jeopardy in the event of any future prosecution for the same conduct.

V.

[4] We find no merit in the defendants' charge that the trial court improperly denied their request for a more detailed bill of particulars. Pursuant to a stipulation entered into five months prior to trial, the Government supplied the defendants with copies of all grand jury testimony, access to all documents subpoenaed from non-defendants; all documents voluntarily submitted to the Government by third parties in the course of the investigation; and all available *Brady* material. In further compliance with the stipulation the defendants received copies of all trial exhibits thirty days prior to trial, as well as a list of intended witnesses and Jencks Act material fourteen days prior to trial. In the light of this extensive disclosure by the Governmant there was no abuse of discretion by the trial court in declining to require the Government to supply the further information requested by the defendants. *See United States v. Schembari,* 484 F.2d 931 (4 Cir. 1973).

VI.

[5] The Government's case against the defendant, Ashland, was based primarily upon the theory that Ashland exercised direct control over the retail operations of five of

its subsidiary corporations, including Payless Stations, Inc. ("Payless")[3]. One of the Government's principal witnesses on the question of Ashland's control was a former vice-president of Payless,[4] who was in charge of its pricing for the period from 1963 through 1973, and who was employed by the company from 1956 through December of 1973. This witness provided direct testimony of Ashland's control over its subsidiaries. His testimony also included other information regarding the participation of Ashland and Payless in the conspiracy and the relationship of Payless with SIGMA.

This key witness had been hospitalized for psychiatric problems on two separate occasions in Our Lady of Peace Hospital in Louisville, Kentucky, and counsel for Ashland subpoenaed the hospital records. They were produced by the hospital administrator who was directed to deliver them to the district judge. After examining the records *in camera*, the judge advised counsel that they reflected two periods of hospitalization, the first being from July 26 to August 29, 1966, and the second from November 20 until December 24, 1968 and that the hospitalizations involved "a mental disorder or illness at that time."

Concluding that the disclosure of the records was within his discretion, the district judge declined to deliver them to counsel for the reason, among others, that he did "not know to what extent the Government's examination of the witness will include questioning during the relative period" (App. Vol. 3, 777, 778). In making this ruling, however, the district judge stated that he was not foreclosing counsel for Ashland from questioning the witness about the two periods of hospitalization, but that he would rule on the questions as the cross-examination of the witness developed.

The hospital records were sealed by the district judge and after this appeal was filed Ashland moved this court

[3] The other subsidiaries were Hi-fy Gasoline Stations, Inc.; Bi-lo Stations, Inc.; Southern Oil Co.; and Red Head Oil Co.

for leave to examine such records. The motion was denied with the provision that counsel for Ashland might renew the motion at the time of oral argument. Following oral argument we granted Ashland's counsel access to the records and they were jointly examined by counsel for Ashland and the Government. Based on this examination of the hospital records, with leave of the court, both Ashland and the Government filed supplemental briefs on the issue of the relevancy of these records.

Counsel for Ashland contends that in denying access to the hospital records the trial court prejudicially impaired Ashland's ability to effectively cross-examine the witness. Ashland argues, among other things, that the hospital records were significant for the purpose of evaluating the witness' perceptive ability during the period in question and suggests, for instance, that if the witness were suffering from paranoia, he might have taken an irrational view of his communications with Ashland and interpreted simple inquiries as commands or binding directives.

As we have noted, the first period of the witness' hospitalization was from July 26 to August 29 of 1966, which was prior to Ashland's acquisition of Payless and also prior to the alleged conspiracy. However, the second period of hospitalization from November 20, 1968, to December 21, 1968, fell within the period of the conspiracy which was alleged to have existed from at "at least as early as 1967 * * * and continuing thereafter until November 1974."

The record discloses that the vice-president in question was admitted to the hospital on the first occasion because of the work related problems. Significantly, the 1966 records show that a "supervisor" at work brought him to the hospital, and that he believed that "people at work were plotting against him." The official diagnosis indicated that his problems stemmed from his employment rather than being home-related. The 1968 records show that he was "manic depressed and admitted in psychotic

state." The records also state that he "still tends to push himself," and contained observations that he was "delusional and hallucinatory with poor judgment and insight." Although the 1968 records do not specifically state that this was a continuation of his work-related problems, the jury might reasonably have drawn such an inference had the contents of the records been disclosed to them during the cross-examination of the witness. The official record incident to the 1968 visit state the final diagnosis as "Schizophrenic Reaction, Schizo-affective Type." On that occasion the "mental status examination" reflected that the patient was manic in behavior and quite talkative, and that he spoke of his experience with God.

It occurs to us that the hospital records should have indicated to the district court that the witness' hospitalization in 1966 was work-related and that it was quite probale that his 1968 illness was of a similar nature. The records should also have indicated to the court that the witness' judgment during both periods of illness was seriously impaired, and that a jury could have concluded that his ability to make rational observations was highly questionable. The records would further indicate that the patient had not fully recovered when he was discharged from the hospital in 1968 since they point out that his condition required further psychiatric treatment and continued medication.[4]

Bearing in mind that the case against Ashland was based upon its alleged direct control over the retail operations of its subsidiaries, including Payless, it is clear that the testimony of the former vice-president was vital to the Government's case. Ashland had acquired control of Payless in 1967 and the witness testified that "Ashland, from the time that they acquired the company [Payless] until the time that I left, assumed gradually more and more control." At another point, in testifying concerning

[4] This witness will be referred to from time to time as the "witness", "vice-president", "key-witness", or "former vice-president."

Ashland's control of prices of Payless the witness stated "this was a growing thing that started in 1968, when Ashland bought it and extended up until at the end, when they were saying what and where and how to price, not just because of the shortage of gasoline, but because they were taking direct control from Ashland's offices in Ashland, Kentucky." It should be noted that during at least a part of this period in 1968 about which the witness testified, he was experiencing acute mental problems with a hospital record which disclosed that he was "delusional and hallucinatory with poor judgment and insight," and was "secluded for his own welfare." Despite this fact, the court forbade Ashland from reviewing the hospital records or putting them to any effective use in the cross-examination of the witness.

Even if it is fair to assume that the hospital records had no direct bearing upon the witness' mental capacity at the time he testified, they were unquestionably relevant in regard to his perception of the events involving his work at Payless during the time of his unfortunate illness, and had a significant bearing upon his ability to testify at trial concerning his recollection of those events. *United States v. Partin*, 493 F.2d 750 (5 Cir. 1974), is the leading case in this field, and is quite similar to the case before us. In that case, one Rogers was a key government witness, just as the former vice-president was here. Rogers had been admitted to a Veterans Administration Hospital for treatment for mental illness. The hospital record revealed that Rogers had stated he was having auditory hallucinations and at times he thought he was some other person. The trial court rejected the admission of the hospital record either as a predicate for cross-examination or as a basis upon which another psychiatrist could have given an opinion as to the mental state of the witness Rogers as that may have had an effect on Rogers' ability to see and hear accurately during the period in which the events occurred about which he was testifying.

The court of appeals reversed the conviction because of the trial court's error in failing to admit the hospital records, reasoning at page 762:

> "It is just as reasonable that a jury be informed of a witness' mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth."

And again on page 763 appears the following:

> "Partin [the defendant] had the right to attempt to challenge Rogers' credibility with competent or relevant evidence of any mental defect or treatment at a time probatively related to the time period about which he was attempting to testify."

To the same effect are *United States v. Hiss,* 88 F. Supp. 559 (S.D.N.Y. 1950), and statements in *United States v. Honneus,* 508 F.2d 566, 573 (1 Cir. 1974), *cert. denied,* 421 U.S. 948, 95 S. Ct. 1677, 44 L. Ed. 2d 101 (1975); *Sinclair v. Turner,* 447 F.2d 1158, 1163 (10 Cir. 1971), *cert. denied,* 405 U.S. 1048, 92 S. Ct. 1329, 31 L. Ed. 2d 590 (1972); *Ramseyer v. General Motors Corp.,* 417 F.2d 859, 863 (8 Cir. 1969); *United States v. Allegretti,* 340 F.2d 254, 257 (7 Cir. 1964), *cert. denied,* 381 U.S. 911, 85 S. Ct. 1531, 14 L. Ed. 2d 433 (1965).

In *United States v. Figurski,* 545 F.2d 389 (4 Cir. 1976), we had occasion to determine whether the contents of a protected report about a key prosecution witness should have been disclosed to defense counsel, and stated:

> "If the report contains only material impeaching the witness, disclosure is required only when there is a reasonable likelihood of affecting the trier of the fact. Whether there is such a likelihood depends upon a number of factors such as the importance of the witness to the government's case, the extent to which the witness has already been impeached, and the significance of the new impeaching material on the witness' credibility."

Id., at 391-92. As discussed above, the former vice-president of Payless was the key government witness. Although the defense presented the testimony of two witnesses that contradicted his testimony regarding Ashland's control over its subsidiaries, the ability of defense counsel to impeach him regarding his ability to properly perceive events about which he testified was severely limited by counsel's inability to examine the hospital records. We can think of no more relevant or significant material than a hospital record indicating that a witness who is testifying against his former employer had been under treatment for mental illness which rendered him at that time delusional and hallucinatory with poor judgment and insight. Although a trial court should seek to prevent the disclosure of embarrassing, irrelevant information concerning a witness, it is an abuse of discretion to preclude defense counsel from obtaining relevant information, and the witness' privacy must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case. *See Davis v. Alaska,* 415 U.S. 308, 319, 94 S. Ct. 1105, 1111-1112, 39 L. Ed. 2d 347 (1974).

Upon careful consideration, we are of the opinion that the action of the district court in denying Ashland access to the hospital records for its use in cross-examination of the former vice-president was so prejudicial that Ashland is entitled to reversal and a new trial.

VII.

[6] With the exception of Ashland, we affirm the convictions of the other corporate appellants. We think, however, that assurances of immunity given to Robert Cavin during the grand jury's investigation and upon which he relied require that his conviction be set aside.

The grand jury investigation was initiated about November 18, 1974, under the direction of Rodney A. Thorson of the Antitrust Division of the Department of Justice. On December 23, 1974, Cavin and Richard

Reynolds, a fellow employee of SIGMA, were subpoenaed to testify before the grand jury and were jointly notified that they should appear in Baltimore on January 7, 1975. Reynolds and Cavin immediately contacted David A. Donohoe, who also represented SIGMA, and arranged to meet with him on January 2, 1975. Donohoe then called Thorson and inquired whether either Cavin or Reynolds were targets of the grand jury investigation. According to Donohoe, Thorson told him "not to worry" because Thorson "was obtaining immunity orders for both Mr. Cavin and Mr. Reynolds and that both would be testifying under a grant of immunity." Based upon Thorson's representation Donohoe concluded that he should suggest to Cavin and Reynolds that they obtain other counsel. In Thorson's recollection of the conversation with Donohoe, he denied making any "promise" that Cavin and Reynolds would receive immunity but recalled stating that he would obtain immunity orders for both if they intended to claim the Fifth Amendment. Thorson also acknowledged that he had requested immunity authorization for both witnesses at about the time he issued subpoenas for their appearance. Thorson also discussed with Donohoe his possible conflict of interest since he was counsel for SIGMA and suggested that Donohoe secure other counsel for Cavin and Reynolds.

At their meeting on January 2, 1975, Donohoe told Cavin and Reynolds of Thorson's assurance that they were to receive immunity, and advised them to obtain other counsel in order to avoid any possible conflict of interest. After some discussion, Donohoe recommended that Cavin and Reynolds consider retaining Donald T. Bucklin. Bucklin met with Cavin and Reynolds at Donohoe's office on that same day and was retained by them. Donohoe repeated to Bucklin the representations concerning immunity that Thorson had made to him. In the light of this information Bucklin discussed with Cavin and Reynolds their rights under a grant of immunity and they were specifically advised of the importance of testifying fully

and honestly in order to obtain the maximum protection under 18 U.S.C. § 6001, *et seq.*

Shortly after the start of a joint briefing session with Cavin and Reynolds on the afternoon of January 2nd, Bucklin called Thorson to advise him of his representation of the two witnesses and to set up a meeting on January 3rd. During this conversation Thorson confirmed the assurance that both Cavin and Reynolds would receive immunity, and was advised by Bucklin that based upon this assurance he perceived no conflict in his joint representation. Thorson agreed that no conflict existed. While Thorson later denied discussing the question of conflict with Bucklin, he did acknowledge that he had repeated his earlier assurance that he would obtain immunity orders if the witnesses intended to claim the Fifth Amendment. On this point Thorson testified before the district court as follows:

> (The Court) Did you state that he would get immunity; he would testify pursuant to an immunity order?
>
> (Mr. Thorson) Yes; yes, I did state that.
>
> (The Court) Can you restate that to me to the best of your recollection as to when it occurred and what was said and to whom.
>
> (Mr. Thorson) I stated that initially in the telephone conversation preceeding the January 3rd meeting in the context that if it is their intention to claim the Fifth Amendment I will obtain an immunity order. And I explained, expressly, that I had no intentions of having the Government go to the expense of having these people come to Baltimore from St. Louis, and then claim the Fifth Amendment and then I'd send them home. That's why I wanted to know what their intention was, and I did not find that out until the meeting on Friday. [January 3].

(App. Vol. 18, at 15,225 and 15,226.)

During the initial joint interview with Bucklin on January 3rd Cavin and Reynolds refreshed each others recollections, supplemented their respective comments and responses, and corrected each others memory of events, dates and names of people with respect to incriminating evidence. On January 3, 1975, Donohoe and Bucklin, together with another attorney, met with Thorson and other prosecutors in the Department of Justice. At this meeting Thorson agreed to obtain immunity orders prior to the grand jury appearances of Cavin and Reynolds based upon the representations that both witnesses would claim their Fifth Amendment privilege.

Subsequent to the meeting on January 3rd, a conflict developed in Bucklin's schedule for January 7th, and Terry F. Lenzner was brought into the case to represent Cavin and Reynolds. On January 6th Thorson called Lenzner and advised him that the appearance of the two witnesses was postponed until January 8th. During that conversation Thorson again confirmed that both witnesses would receive immunity, and it was agreed that the attorneys would meet on the morning of January 8th and proceed to the supervisory judge's chambers for the signing of the immunity orders. At about 7:30 p. m. on that evening Thorson called Lenzner at his home and advised him that the subpoena for Cavin was being cancelled. The reason given by Thorson for the cancellation was a scheduling problem and Lenzner was told that he would be advised if and when Cavin's appearance was rescheduled.

Under date of January 7, 1975, Lenzner advised Thorson by letter that his representation of Cavin and Reynolds was based upon Thorson's assurance that both individuals were to testify under a grant of immunity on the same day, and that because of a possible conflict of interest resulting from the cancellation of Cavin's subpoena, Lenzner was withdrawing from further representation of Cavin. Lenzner was unable to advise Cavin of these developments since both Cavin and Reynolds were en

route to Washington. Cavin expressed some concern about the postponement but was assured by Lenzner that Thorson had indicated it was due only to a scheduling problem.

At the grand jury session on January 8th Thorson commenced his examination of Reynolds concerning SIGMA documents without an immunity order, whereupon Reynolds refused to answer "on the grounds that it violates the agreement between the Government and my counsel that I would be questioned only after receiving immunity and that I would be granted immunity today before testifying." Thorson then called upon Donohoe to produce someone to identify the SIGMA records, and the following exchange took place:

> (Mr. Thorson) Well, do I understand that you, as counsel for SIGMA are refusing on behalf of SIGMA to produce someone—
>
> (Mr. Donohoe) No, I'm not.
>
> (Mr. Thorson) —from that association to come here and testify, take an oath and testify as to the document production?
>
> (Mr. Donohoe) I think you know perfectly well what I'm saying. I brought two people to this City pursuant to subpoenas that you had directed, so I had two people who could have testified with respect to these documents, but because the commitments that you had made to these two individuals have not been kept, I'm no longer able to go get a third or fourth or fifth person. That's a situation which is not of my making.
>
> (Mr. Thorson) Do I understand that you are refusing at this juncture to provide a person to make that production?
>
> (Mr. Donohoe) All I'm saying is that there are two people that have — that I have brought that are capable to do that, but I'm willing to assure you that it won't do you any good because you failed to keep your commitment to obtain a proper order from the

> Court. You can take Mr. Reynolds or Mr. Cavin in here, but it's not going to do any good.
>
> (Mr. Thorson) Mr. Donohoe, I think you can take SIGMA's documents with you now and would you so instruct, if he is your client, would you instruct Mr. Reynolds to appear before the Grand Jury now?

(App. Vol. 8, at M86 and M87.)

Reynolds was formally granted immunity later that day and testified before the grand jury. In his affidavit, Reynolds stated that during his grand jury appearances he was questioned and testified about matters he had earlier discussed with Cavin and that his testimony, at least in part, was based upon information Cavin had given him after they were told that both would receive immunity. In the process of obtaining an immunity order for Reynolds, Thorson showed Lenzner a document which reflected an authorization of immunity for both Cavin and Reynolds, and Lenzner concluded that Cavin was to be called later to testify under a grant of immunity. Under these circumstances, he perceived no conflict of interest and debriefed Reynolds fully in the presence of Cavin. Some fourteen months later, in March of 1976, Reynolds was recalled as a witness before the grand jury and again discussed his testimony with Cavin, acting under the belief that neither he nor Cavin would be indicted. On June 1, 1976, Cavin was named as a defendant in the indictment.

These facts were largely undispurted and Cavin filed a motion in the district court alleging that the Government's conduct warranted dismissal of the indictment as to him. The court denied this motion, and Cavin filed an appeal. We dismissed the appeal, holding that the denial of the dismissal motion was not an appealable final decision within the meaning of section 1291. *United States v. Cavin*, 553 F.2d 871 (1977).

Our review of the record persuades us that the conduct of the Government cannot withstand the scrutiny of

Cooper v. United States, 594 F.2d 12 (4 Cir. 1979), and *United States v. Carter*, 454 F.2d 426 (4 Cir. 1972). In *Carter*, the defendant alleged that incident to a plea bargain with the United States Attorney's office in the District of Columbia, involving certain stolen checks, he was promised that he would not be prosecuted elsewhere for anything having to do with the checks. We held that if such a promise was made as alleged and the defendant relied upon it, it was binding upon the Government and barred any subsequent prosecution for the stolen checks in the Eastern District of Virginia. We approved and applied the holding of *United States v. Paiva*, 294 F. Supp. 742 (D.D.C. 1969), that

> "if, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision so to do will come under scrutiny. If it further appears that the defendant, to his prejudice, performed his part of the agreement while the Government did not, the indictment may be dismissed,"

294 F. Supp. at 747.

In considering Cavin's dismissal motion, the district judge recognized that the principles of *Carter* were controlling, but concluded there was no promise of immunity by the Government, and "that Cavin (1) did not rely on the alleged promise and (2) to the extent such reliance is claimed it was not reasonable." In our opinion, the record does not support either of these conclusions. In reaching this conclusion, we hasten to point out that this is not a case of subjective wishful thinking on the part of either Cavin or his counsel. It is undisputed that the assurance of immunity was first given to Donohoe by Thorson in their telephone conversation on December 23, 1974, and was communicated to Cavin and Reynolds at that time. In the light of such assurance, from that date on Cavin's conduct and especially his interchange of information with Reynolds was influenced by the anticipated immunity.

Donohoe recognized the validity of the promise when he resigned as counsel for Reynolds and Cavin due to the apparent conflict between them and SIGMA. As successor sel for the witnesses, Bucklin had been advised of the immunity by Donohoe and received direct assurance to that effect from Thorson on the afternoon of January 2nd. Assuredly, Bucklin considered the promise to be viable when he conducted his joint conferences and briefings of Cavin and Reynolds in reliance thereon. Finally, on January 6th Thorson confirmed to Lenzner that both witnesses would receive immunity.

In giving these successive assurances to Cavin's attorneys, Thorson knew or certainly should have known, that both Cavin and his counsel would rely upon them and govern their conduct accordingly. The constitutional overtones of such a situation were recognized by Judge Phillips in *Cooper v. United States, supra;*

> "To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as in the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised. [Footnote omitted] At the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas."a9594 F.2d at 18, 19.

In concluding that Cavin's reliance upon the promise of immunity was unreasonable the district judge, drawing upon the law of promissory estoppel, observed that Thorson's assurance of immunity was a statement "of present intention subject to change for numerous reasons." Focusing upon Bucklin as an experienced attorney, the court charged him "with knowledge of the many variables involved in the immunity process," and concluded that "given these considerations and the facts of this case,

reliance upon a purported promise of immunity before an immunity order has been signed and one has actually testified before the grand jury is manifestly risky and hence unreasonable." In our opinion the fallacy of this conclusion is that we are not primarily concerned with the gauge of Bucklin's professional caution or responsibility. The question is whether Cavin, as a layman, acted reasonably in relying upon Thorson's assurances of immunity, and our appraisal of such reliance should not be made on the basis of any fine-fingered legal analysis. As we observed in *Cooper:*

> "constitutional decisions cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals."

594 F.2d at 17. In our opinion the record in this case clearly required a finding that Cavin acted reasonably in relying upon the Government's promise of immunity.

Although he had found that there was no promise of immunity, nor any reasonable reliance by Cavin upon any such alleged promise, the district judge recognized the existence of a serious question with respect to Reynolds' testimony at trial. When counsel for the Government advised the court that he intended to use Reynolds to incriminate Cavin the court observed: "To the extent that Mr. Reynolds does not have an independent recollection of any statement that Mr. Cavin made to him and acquired that recollection through the so-called briefing, if that is what it was, it seems to me that that statement might well be suppressed." In discussing the procedure to carry out this ruling, the court advised counsel that he would "take it on a line—by line—basis" as the trial progressed. An examination of the record discloses that Reynolds' recollection covering several years was inextricably interwined with the information which he had received from Cavin concerning SIGMA'S operations either in the joint briefing sessions or otherwise. This was illustrated when, during

the course of his testimony, he stated: "My own independent recollection — I have been briefed and debriefed before the Grand Jury and quizzed and requizzed, and I am not sure what is my own independent recollection." (App. Vol. 5 at 1477). In our opinion, the Government's use of Reynolds as its principal witness against Cavin after the two of them, acting pursuant to the assurances of immunity, had worked together so closely in their review of SIGMA's operations was violative of the basic concept of fundamental fairness. The lodestar of *Carter* was stated by Judge Winter as follows:

> "There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government."

454 F.2d, *supra*, at 428.

In our original opinion we concluded that the fair administration of justice required not only that Cavin's conviction be reversed but that the case be remanded with instructions to dismiss the charges against him. Upon reconsideration, however, we are of the opinion that this relief was too broad and was at variance with the observations made by us in *United States v. Cavin, supra.* In the course of our consideration of Cavin's abortive appeal we stated:

> "In contrast to the Double Jeopardy Clause's prohibition against retrial, the remedy to vindicate the Fifth Amendment's protection against self-incrimination is much more circumscribed. One who claims that his confession or other incriminatory statements have been illegally obtained by promises of leniency, deception, or coercion is not entitled to avoid trial by securing dismissal of his indictment. His remedy is suppression of his statement."

553 F.2d, at 873. This observation accords with the pronouncements of the Supreme Court in this area. *See*

United States v. Blue, 384 U.S. 251, 255, 86 S. Ct. 1416, 1419, 16 L. Ed.2d 510 (1966); *Lawn v. United States,* 355 U.S. 339, 348-50, 78 S. Ct. 311, 317-318, 2 L. Ed. 2d 321 (1958).

[7] Unlike the situation in *Carter, supra,* the Government made no promise to Cavin that he would not be prosecuted. The record indicates only that the Government assured Cavin of immunity, and the only type of immunity which could have been offered to him was that prescribed by 18 U.S.C. § 6002. The statute authorizes only use immunity, not transactional immunity, and the grant of use immunity does not justify dismissal of the indictment. If it elects to do so, the Government can still proceed with the prosecution but cannot use any evidence or the derivative of any evidence which it has obtained through the grant of immunity. "[S]uch immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader." *Kastigar v. United States,* 406 U.S. 441, 453, 92 S. Ct. 1653, 1661, 32 L. Ed. 2d 212 (1972).

Accordingly, Cavin's conviction is reversed and his case is remanded to the district court for a new trial if the Government so elects. In the event of a new trial the district court should not permit the Government to offer any evidence directly or indirectly derived from Cavin which resulted from its assur ance of immunity to him and Reynolds.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

WIDENER, Circuit Judge, concurring:

While I concur in the opinion, I would add a work.

At trial, the prosecution played to the jury a tape recording of an alleged telephone conversation between

one Joseph Painter, a government witness and former employee of Hess, and Norman Goldberg, former marketing coordinator for defendant Amerada Hess Corporation. The government contended that this conversation was evidence of the price-fixing conspiracy. Although numerous parts of the tape were inaudible,[1] the government was not only allowed to introduce into evidence the tape but was also allowed to give to the jury, not as evidence but as an "aid," a transcript of the tape, the orgin of which transcript was not certain and which in plain terms was merely a statement of what someone (apparently the transcriber) thought the tape said.

The prosecution was also allowed to introduce a controversial tape of a speech made at a SIGMA meeting by one Teak, the Executive Director of SIGMA, who was deceased at the time of trial, and a transcript of the tape, the orgin of which transcript was also not definitely determined. This Teak tape, only parts of which were played to the jury, was extremely damaging to the defendants' case.

Where a tape recording has been made of an admissible conversation, even if the tape may be admissible, I feel that a transcript of the tape should not be. Neither should it go to the jury as an "aid." Although our decision in this case, while not in terms, follows the circuit rule that such transcripts are admissible, *United States v. Hall,* 342 F.2d 849 (4th Cir. 1965), I think it is quite unfair and prejudicial to the party against whom the evidence contained on the tape is offered. It is known by all that a paper writing adds a kind of authenticity to any statement. In addition, the jury has access to that testimony while in the jury room, if admitted into evidence. All of this leads me to the conclusion that by permitting a transcript of a recorded tape to be intoducted into evidence or by permitting its use as an aid, undue emphasis is placed on the testimony

[1] Joint Appendix Vol. 7, p. 1966–1975 reveals 119 inaudible portions in 9½ pages of transcript. *Hall,* infra, had 25% inaudible, p. 853.

represented by the tape recording, and amounts to nothing more than the transcription for the jury of the testimony of one witness to the exclusion of that of others. I think our rule on this question is incorrect and would have granted rehearing en banc, changed the rule, and awarded a new trial on this account.

Having received not near enough support to prevail on the proposition voiced just above, I have not dissented, and make no attempt to detract from the opinion except to voice my disagreement with the established circuit rule.

K. K. HALL, Circuit Judge, dissenting in part:

The majority has concluded that Ashland Oil was entitled to reversal and a new trial because the hospital records of a key government witness were not made available for use in cross examination. I respectfully dissent. In my opinion, the district court acted within its discretion to protect the rights of all parties involved.

As the majority observes, the trial judge reviewed the records *in camera* and advised counsel that they revealed two periods of hospitalization, the first being from July 26 to August 29, 1966, and the second from November 20 until December 24, 1968. The judge correctly advised counsel that the hospitalizations involved a "mental disorder or illness." Acknowledging that the government's examination might enter the periods of hospitalization, the judge clearly gave Ashland the option to cross examine the witness about his hospitalizations. The judge also gave the following assurance:

> "If it appears to me that the witness answers any questions in a manner which the records contradict, then I will consider, of course, making that particular bit of information from the psychiatric records available to you; not giving you the records, but advising you in that respect what it is.
>
> * * * * * *

> In the event the witness answers in ways that I would believe to be contradicted by the records in any way, I would call that to your attention, * * *."

(App. Vol. 3, at 779).

Having reviewed the witness' testimony and the hospital records, I discern no reversible error. The hospital records had no bearing upon the witness' competency to testify at the time of trial. At best, they would only show that his judgment at the very beginning of the conspiracy period might have been impaired a matter which was adequately revealed to the jury on cross-examination. Two periods of psychiatric hospitalization necessarily indicate that a patient's judgment at that time and possibly for some period thereafter would be somewhat impaired, and the jury was well aware of this fact and its implications. Additionally, and significantly, I think, counsel for Ashland failed to avail themselves of the offer of Judge Blair to cross-examine the witness on the possible effect his illness had on his perceptive abilities and his attitude toward his colleagues in Payless and Ashland during the operative period. The failure to make such an exploration cannot be attributed to the lack of the hospital records for counsel vigorously questioned the former officer concerning his hostility toward his colleagues and Ashland indicated in argument to the district court its awareness that paranoia might have colored the witness' perception.

I think that the district judge acted appropriately and discreetly in declining to open up the hospital records in their entirety. These are typical hospital records, with some of the entries being handwritten and others typed; some legible and other illegible; they include nurses' notes, tentative diagnoses and comments by the physician, as well as notations of medication and treatment. To place all of this material in an intelligent perspective, both as it related to the period of the conspiracy and the time of the witness' appearance in court, would have required expert testimony. At the time of trial the attending physician was

deceased, and the introduction of this material would merely have led the jury into a confusing collateral thicket. Whether such an excursion should be permitted rested in the sound discretion of the trial judge and in my opinion, he properly declined to countenance it. Based upon my examination of the record, I perceive no "reasonable likelihood" that the hospital records would have had any material effect upon the jury's determination of the issues in this case. *See United States v. Figurski*, 545 F.2d 389, 391 (4th Cir. 1976).

I concur in the remaining parts of Judge Field's opinion.

In The United States District Court
For The District of Maryland

Criminal No. 3-76-0314

United States of America

v.

Society of Independent Gasoline Marketers of America, et al

MEMORANDUM AND ORDER

Defendants in this criminal antitrust action have filed a consolidated motion to dismiss the indictment because of prejudicial pre-indictment delay. The motion papers also urge, as an alternative ground for dismissal, a theory of estoppel. An evidentiary hearing showed the latter theory to be wholly without merit. Accordingly, it will be dispensed with before discussing the more troublesome issue of preindictment delay.

I.

The estoppel theory is premised on the following facts. In November of 1968, George Spencer, publisher of *Oil Week*, tape recorded at least part of a meeting of the Society of Independent Gasoline Marketers of America (hereinafter "SIGMA"), a defendant in this action. Spencer delivered the tape to John Waters, an attorney with the Antitrust Division of the Justice Department. The tape, a copy of the transcript of which this court has read, contained references to price information exchanges similar to those allegedly underlying the present indictment.

The parties dispute whether as a result of 1) Spencer's delivery of this tape to Justice and possibly 2) the Supreme Court's decision in *United States v. Container Corp.*, 393 U.S. 333 (1969), SIGMA ceased its alleged price clearinghouse activities. In any event, at least the former, and perhaps the latter, event compelled Howard Teak,[1] then Executive Director of SIGMA, to travel to Washington in early 1969 to meet with government attorneys concerning these activities.

It is here that the dispute between the parties becomes acute. Defendants argue that at, or as a result of, this meeting, purportedly with Justice Department attorneys, Teak received assurances that his activities did not run afoul of the antitrust laws. In reliance thereon, Teak resumed his pricing activities. Hence the government is estopped to prosecute.

Even assuming that this is a correct argument in law, *see United States v. Barker*, 44 U.S.L.W. 2544 (C.A.D.C. May 17, 1976); *Model Penal Code* § 2.04(3)(b), the evidence clearly fails to establish the existence of any government assurances upon which Teak could rely. In fact, the

[1] Teak apparently was the chief, if not the sole, pivot man in the price exchanges. The ceasing of these activities thus primarily affected him. In fact, the phraseology used at the hearing to describe the situation was that "Howard" had been cut-off.

defendants' evidence actually refutes their estoppel argument.

Only one person accompanied Teak to his meeting with government attorneys — Winslow Cady, then a director of SIGMA. Cady, testifying as a defense witness at the evidentiary hearing on this motion, stated that he has no recollection of who the two attorneys were with whom he and Teak met. Teak is now dead. Cady thus becomes the only identifiable individual and personal knowledge of the meeting with government attorneys.

Cady testified that Teak told him they were going to the Justice Department, but Cady has no personal knowledge that they in fact went to the Justice Department. He knows only that they went to "a building" which he believes was the Justice Department where they were ushered into a room and subsequently joined by two individuals, ostensibly government attorneys. Cady has no present recollection of whether they were from the Justice Department or from the Federal Trade Commission; he is positive only that they were attorneys. As to what was discussed at the meeting, Cady recollects that the Spencer tape was one topic and that Teak's pricing activities were another.

Regardless of what was discussed and who the two attorneys were, however, Cady's testimony revealed the critical fact that the attorneys said *they would take up the matters presented with their superiors and would get back to Teak one way or the other.* Cady gave no testimony suggesting assurances were given at the meeting. He further testified that he was never contacted by government attorneys as a consequence of this meeting, nor was Teak, to his knowledge.

Moreover, Cady's testimony was that Teak was elated by the results of the meeting and was back in the price communication business within a short time thereafter. The conclusion is inescapable that Teak acted on his own initiative and not on government assurances in resuming

his activities. In further support of this conclusion is Cady's testimony that Teak's work consisted in major part of providing price information services, that Teak feared the loss of his thirty or forty thousand dollar a year job if the cut-off continued, and that Teak never gave counsel for SIGMA prior notice of his Washington meeting.

After the Washington meeting it became common knowledge among the members of SIGMA that Teak was back in business and it became a common belief that he had received Justice Department approval for his price communications. This court finds that the sole source of that common belief was Teak himself and that he had in fact received no Justice Department assurances other than what he wanted to believe he had received.

Furthermore, on cross examination Cady revealed that Teak had not discussed price disturbances, price wars or price restorations with the government attorneys. Thus, any assurances he might have received would not necessarily be based on the whole truth of his activities, and therefore could not support their wholesale resumption. In fact, the court believes that no assurances were given, much less any on which reliance was justified.

The court made known to counsel at the hearing that their evidence was wholly insubstantial. One response of defense counsel was to point out that the government had put on no evidence to show that the Washington meeting had not occurred and, presumably, that assurances had not been received. The short answer to that observation is that the burden, at least in the first instance, was on the defense to establish, and not on the government to rebut, the allegations in the motion. The defense failed to introduce sufficient evidence to warrant the government introducing anything. Assuming the meeting occurred, and that it was with Justice Department attorneys, a proposition subject to doubt, there is a complete dearth of proof that anything transpired there or thereafter which would justify the assumption by Teak that he had Justice

Department approval for the resumption of his activities. The motion is denied as to the estoppel argument.[2]

As suggested earlier, the question of pre-indictment delay is more difficult. The relevant chronology is as follows:

1) Novermber 1968 — Spencer tapes SIGMA meeting;

2) Spencer gives tapes to John Waters of the Antitrust Division;

3) Teak is allegedly cut-off;

4) early 1969 — Teak and Cady go to Washington;

5) Teak resumes his price communications;

6) 1969-1972 — Teak spreads word of Justice Department assurances;

7) 1972 — Teak dies;

8) April 3, 1973 — *Phillips v. Crown Central Petroleum Corp.*[3] is filed in the District of Maryland;

9) December 1974 — antitrust grand jury is organized;

10) January 1975 — first evidence is presented to grand jury;

11) June 1, 1976 — grand jury returns indictment.

[2] The court further notes that 28 CFR § 50.6 makes express provision for the obtaining of Justice Department approval for one's conduct. This suggests (1) that any other method is inappropriate, and thus no defense, *see* United States v. Secony-Vacuum Oil Co., 310 U.S. 150, 226-27 (1940), and (2) that Justice Department attorneys would be unlikely to give assurances in the instant circumstances. Furthermore, it is highly suspicious that no written documentation of the meeting or the assurances exists. True enough, it was over eight years ago, but too much was at stake to allow bona fide assurances to go so undocumented that no memorandum survives.

[3] The *Phillips* decision is reported at 395 F. Supp. 735 (D. Md. 1975).

Defendants argue they have been prejudiced in violation of their rights to due process by the seven and one-half year delay between when the government received the Spencer tape and when it finally indicted them. They rely on the case of *United States v. Marion,* 404 U.S. 307 (1971) and its progeny.

It has become traditional in post-*Marion* cases to preface discussion of the merits of the instant motion with two things. First is the quotation of the key language from *Marion:*

> [I]t is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-dictment delay in this case caused substantial prejudice to appellees rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case.

404 U.S. at 324-25 (footnotes and citation omitted).

The second custom is to observe that it is not clear whether *Marion* requires *both* prejudice and intentional delay or whether *either* may suffice to warrant dismissal of an indictment. The courts have gone in all directions. Some courts say both are required. *E.g., United States v.*

Frumento, 405 F. Supp. 23 (E.D. Pa. 1975). Other courts hold either will do. *E.g., Hamilton v. Lumpkin*, 389 F. Supp. 1069 (E.D. Va. 1975). Many courts avoid the issue, holding that they need not decide it because the case before them involves both, *see e.g., United States v. Barket*, 530 F.2d 189, 194-95 (8th Cir. 1976), or neither, *e.g., United States v. Mandel*, 415 F. Supp. 1033 (D. Md. 1976). Finally, several courts have decided that balancing the two is the correct approach. *E.g., United States v. Jackson*, 504 F.2d 337, 339 & n.2 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

There is apparently no rule yet in this circuit, or even in this district, on the issue. *See United States v. Alderman*, No. Y-76-0319 (D.Md. Dec. 13, 1976); *United States v. Mandel, supra. Mandel* avoided the problem entirely. *Alderman* reached some conclusions about the rule to be applied, but in the end found both prejudice and intentional delay and never said whether neither or both were required. The court in *Alderman* proposed balancing the two, slip op. at 14, but the ultimate finding that both were present enabled Judge Young to avoid deciding what happens when only one is present. Presumably, on a balancing theory both elements are generally required but in an appropriate case one may be so egregious as to obviate the need for showing the other.

It is the opinion of this court that a showing of both prejudice *and* intentional delay is required before a court *must* dismiss.[4] *Accord, United States v. Duke*, 527 F.2d 386, 390 (5th Cir. 1976); *United States v. MacClain*, 501 F.2d 1006, 1010 (10th Cir. 1974); *See United States v. Cowsen*, 530 F.2d 734, 737 (7th Cir. 1976); *United States v. Alred*, 513 F.2d 330, 332 (6th Cir. 1975).[5] In the instant

[4] The possibility that a court *might* dismiss on a lesser showing is discussed *infra*.

[5] There is also some Fourth Circuit support for the proposition that both delay and prejudice are required. In a series of pre-*Marion* cases the Court of Appeals confronted the due process aspects of pre-indictment delay and held clearly that

case neither element is present, as will appear more fully hereinafter. Thus, even if the standard were "either/or," defendants would be entitled to no relief.

There is a further split of authority as to the nature of the delay required. Some courts have opted for a standard of "unreasonable" rather than "intentional" delay. *Compare, e.g., United States v. Barket,* 530 F.2d 189, 193 (8th Cir. 1976), *cert. denied,* 44 U.S.L.W. 3329 (1976) *with United States v. MacClain,* 501 F.2d 1006, 1010 (10th Cir. 1974). To these courts if a defendant can show the delay between crime and indictment was "unreasonable," he may-with the requisite showing of prejudice—be entitled to relief.

Mandel and *Alderman* both assumed that "intentional" delay was the proper standard, *Mandel,* 415 F. Supp. at 1058; *Alderman* slip op. at 3, and this court believes that assumption was a correct one. *Marion* itself so indicates. 404 U.S. at 324 and 325. It would thus seem clear that intentional rather than merely negligent delay is required before a court must dismiss. *Acccord, United States v. Duke, supra; United States v. MacClain, supra.*

In fact, it would seem that more than merely intentional delay is required before a court must dismiss. The Supreme Court's language in *Marion* suggests that bad purpose is an additional requirement. Thus the Court spoke of government delay for the purpose of harassment or to gain tactical advantage. 404 U.S. at 325. Such a requirement seems wholly proper to this court. It is easy to envision situations where the government intentionally, but justifiably, delays in obtaining an indictment. *United States v. Cowsen,* 530 F.2d at 737 (to protect undercover investigation); *United States v. Foddrell,* 523 F.2d 86, 88 (2d Cir.), *cert. denied,* 423 U.S. 950 (1975) (to make

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delay alone was not enough; a showing of actual prejudice is required. United States v. Baker, 424 F.2d 963, 970 (4th Cir. 1970); United States v. Harbin, 377 F.2d 78, 79-80 (4th Cir. 1967). The nature of the required delay is not clear, however.

positive identification of defendants); *United States v. MacClain*, 501 F.2d at 1010 (to enable preparation of complex case); *United States v. Benson*, 487 F.2d 978, 985-86 (3d Cir. 1973) (to protect parties from improvident criminal proceedings). Accordingly, it is sensible that the delay be both intentional *and* improperly motivated before a court must dismiss.[6] *Accord, United States v. MacClain*, 501 F.2d at 1010; *see United States v. Cowsen*, 530 F.2d at 737. This is not to say that a court in the exercise of its discretion could not dismiss on a lesser showing, but only that it need not. *Compare United States v. Barket, supra, with United States v. United States Gypsum Co.*, 1977-1 Trade Cases ¶ 61,238 (3d Cir. Jan. 6, 1977).

The defendants here seek to impose upon the government a duty to investigate. They in effect argue that when George Spencer gave the tape of the SIGMA meeting to John Waters, there arose a duty on the part of the government to follow up on the lead thereby provided. The government is accordingly responsible (in the sense that the right to due process has been triggered) for the prejudice which resulted from the failure to indict for seven and one-half years.

The record, however, shows at best a negligent delay unaccompanied by any improper motivation. Intentional delay occurs when the prosecution becomes aware of facts that warrant follow-up and then purposefully fails to follow them up. *Cf. United States v. Ricketson*, 498 F.2d 367, 371 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974). John Waters apparently never listened to the Spencer tape. He was involved in other matters at the time Spencer delivered the tape and seems never to have found time to listen to the tape or to forward it to others prior to his retirement. Waters Affif. ¶¶ 3-5; Thorson Affid. ¶¶ 6, 8-11. Waters did make a note indicating that he had spoken to

[6] Even the cases applying a reasonable delay standard look at the government's justification for the delay. *See* United States v. Barket, *supra*. Improper motivation would be a consideration in such an analysis.

Spencer and suggesting that Spencer had informed him of possible price-fixing among the independent gasoline marketers. Waters Affid., Exhibit A. But there is no evidence that Waters intentionally withheld investigation, much less did so for some improper reason. There having been no intentional and improper delay between the delivery of the Spencer tape to the Department of Justice and the filing of the civil action in *Phillips v. Crown Central Petroleum Corp., supra,* the defendants are not entitled to relief for any prejudice which may have resulted during that time. *See United States v. Ricketson,* 498 F.2d at 371.[7]

As to whether there was intentional and improper delay between the filing of the *Phillips* suit and the bringing of the present indictment the answer is also no. *Phillips* was filed in April 1973 but not finally decided until May 20, 1975 and the antitrust grand jury was empanelled in December 1974. There is no allegation of an unwarranted delay between the commencement of the grand jury investigation and the return of the indictment on June 1, 1976. The period to focus on, then, is the twenty-month period from the filing of *Phillips* to the empanelling of the grand jury. There may well have been an intentional delay by the government during this period, but this court is of the view expressed in *United States v. United States*

[7] This court is aware of Judge Young's statement in *Alderman* that "[i]f the reason for such delay is the scarcity of prosecutors and the abundance of [defendants], the answer is found not in shortchanging the due process rights of individuals but rather in adequately funding and staffing prosecutorial offices." United States v. Alderman, *supra,* slip op. at 19. This comment is inappropriate in the present case because the facts are different. It is one thing to charge the government with the responsibility of maintaining a prosecutor's staff sufficiently large to prosecute where the crime and criminal are both known, as in *Alderman,* it is quite another to require the government to maintain a prosecutor's staff big enough to investigate every lead that comes its way. *Cf.* Hoffa v. United States, 385 U.S. 293 (1966) (cited in *Marion,* 404 U.S. at 325 n.18): "There is no constitutional right to be arrested." 385 U.S. at 310.

Gypsum Co., 1977-1 Trade Cases, ¶ 61,238 (3d Cir. Jan. 6, 1977). In that case the court held that the fact that "any delay in empanelling the grand jury resulted from the Government's reluctance to frame criminal charges against [the defendants] before learning whether plaintiffs in a civil action could carry their burden of proof" did not entitle the defendants to relief. *Id.* at 70,687. *See also United States v. Benson*, 487 F.2d at 986 (intentional delay permissible to protect against improvident criminal proceedings).

In this court's view the failure to show intentional and improperly motivated delay is sufficient to warrant the denial of relief. But even applying the rule that a showing of prejudice alone might warrant relief, no relief is here mandated because no prejudice has been shown.

At the outset it is to be noted that the cases are apparently uniform in requiring a showing of actual as opposed to potential prejudice. *E.g., United States v. Marion, supra* at 326; *United States v. McGough*, 510 F.2d 598, 604 (5th Cir. 1975). Furthermore, it is the general view that the burden is on the defendant to prove such prejudice. *E.g., United States v. United States Gypsum Co., supra* at 70,687. The Fourth Circuit would appear to follow the general rule in both respects — that actual prejudice must be shown and that the burden is on the defendant to show it. *United States v. Baker*, 424 F.2d 968, 970 (4th Cir. 1970). Although *Baker* was pre-*Marion*, it largely presaged the *Marion* discussion of pre-indictment delay and would appear to be undisturbed by *Marion*.

The defendants assert first that the delay here is so lengthy and the government so culpable as to warrant presuming prejudice. Def. Mem. at 7-13. While a court might do so in the exercise of its supervisory powers, there is no requirement that it do so as a matter of due process. Accordingly, before discussing what this court might do pursuant to its supervisory powers, inquiry will be made into whether actual prejudice — which would require

relief if coupled with an intentional and improperly motivated delay — has been shown.

Defendants offer four examples of how they have been actually prejudiced, as well as claiming the impossibility of proving actual prejudice when the reality of the prejudice can only truly be shown by the witnesses and documents whose present non-existence constitutes the prejudice. Def. Mem. at 13-14. While there is some appeal to the impossibility argument, *Marion* makes clear that it is permissible to let the defendants suffer under that burden. "Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." 404 U.S. at 326. This passage suggests that the defendants are not entitled to the inference they seek, at least at this stage of the proceedings. Rather, the burden at this stage of the case is the proof, and not the presumption, of actual prejudice.

The four examples of actual prejudice cited here are: 1) the death of Howard Teak, 2) the death or disability of other key witnesses, 3) due course destruction of many documents, and 4) Teak's reliance on Justice Department assurances in resuming his pricing activities. It is clear from Section I of this opinion that Teak's reliance was unjustified. There was no "rule change" by the government, as defendants argue, in previously approving Teak's activities and now indicting the defendants because of them. Teak resumed his activities upon his own initiative. To say that the defendants were thereby prejudiced is to say that anyone who is indicted for his crimes is prejudiced by his commission of them.[8]

[8] Furthermore, this is not the type of prejudice contemplated by *Marion*. A defendant must be prejudiced in putting on the defense of his case to claim a due process violation. The fact that the defendant continues to incriminate himself after the government has evidence against him is not cognizable as a violation of his constitutional rights. *See* Hoffa v. United States, 385 U.S. at 309-10. Although *Hoffa* dealt with Sixth Amendment claims, the holding is applicable to Fifth Amendment claims as well.

Whether the defendants are prejudiced by Teak's death is speculative at best. After hearing Winslow Cady testify at the evidentiary hearing on the government-assurances aspect of this motion, the court is certain that the record of Teak's activities is amply preserved. Furthermore, Teak allegedly conducted his pricing activities by receiving and disseminating price information, primarily by telephone. It takes two to converse. In *every* instance of a price communication there must be at least one person other than Teak who was a party thereto and who could testify as to what was said. Some of these other persons may also be dead, but it would defy belief for everyone, or even a substantial portion of the actors, given the extent of the conspiracy charged, to be gone from the scene. The cases cited by the defendant for the proposition that the death of even one witness may warrant dismissal of an indictment are distinguishable. In those cases, the defendant lost the *only* witness who could have corroborated his story. *E.g., United States v. Wilson,* 357 F. Supp. 619 (E.D. Pa. 1973); *United States v. Kleinbard,* 333 F. Supp. 699 (E.D. Pa. 1971). This is not the case here. The court finds no actual prejudice in the death of Teak alone.

Defendants also assert the death of five and the disability of three other SIGMA witnesses. No reason is given why the three incapacitated persons cannot testify. Indeed, by defendants' own admission two are still directors of SIGMA. Def. Mem. at 14. As for the five who are deceased, there has been no showing that they could have offered exculpatory evidence not merely cumulative of that which the many witnesses who are alive may offer. *See United States v. United States Gypsum Co., supra* at 70,688 (indictment upheld despite deaths of thirty-six potential witnesses); *United States v. McGough,* 510 F.2d at 604 (district court dismissal reversed for presuming death of six potential witnesses to be prejudicial).

Lastly, defendants assert the destruction of documents — "in the course of [their] regular document retention program" — "which could have provided evidence regard-

ing the Justice Department validation of SIGMA's activities." Suffice it to say, this court is highly skeptical that documents of such importance would be destroyed by companies of the defendants' size and sophistication. Furthermore, Cady's testimony belies the existence of any documentation of Justice Department validation for two reasons. First, it is clear that such validation never existed except in Howard Teak's mind. Second, it is likely that any such documentation originated from Howard Teak and would do no more than corroborate the fact, testified to by other witnesses, that Teak spread the word he had obtained government approval of his activities; such documents would not prove that the assurances were actually given.

The defendants have thus failed to prove any actual prejudice. No meaningful impairment of their ability to defend themselves appears.

III.

From the foregoing, it is clear that the defendants have shown no denial of due process and therefore have no right to dismissal of the present indictment on the grounds of preindictment delay. There is left the final question of whether this court should, in the exercise of its supervisory powers, apply a stricter standard than *Marion* and dismiss the indictment. *United States v. Balochi*, 527 F.2d 562 (4th Cir. 1976).

Defendants rely heavily on *United States v. Barket, supra,* in which the Eighth Circuit upheld the district court's dismissal of an indictment. Although defendants urge *Barket* on this court as a proper application of *Marion,* it is this court's view that *Barket* invokes a stricter standard of due process than *Marion* requires and is thus more properly treated as authority for the exercise of supervisory powers.

The *Barket* court modified the *Marion* requirement of intentional delay into one of unreasonable delay.[9] Insofar as *Barket* purports to say that *Marion* requires as to the delay element only that it be unreasonable, this court disagrees. Insofar as Barket offers guidance in the exercise of supervisory powers, this court believes the exercise of those powers is inappropriate in the present case.

Accordingly, it is this 30th day of March, 1977, by the United States District Court for the District of Maryland, ORDERED:

That the motion of all defendants to dismiss the indictment on the grounds of pre-indictment delay be, and the same hereby is, DENIED.

The Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.

C. STANLEY BLAIR,
United States District Judge.

[9] *Accord,* United States v. Wilson, 357 F. Supp. 619 (E.D. Pa. 1973).

United States District Court For The District of Maryland

Criminal No. 76-0314

United States of America

v.

Society of Independent Gasoline Marketers of America; Amerada Hess Corporation; Ashland Oil, Inc.; Continental Oil Company; Crown Central Petroleum Corporation; Kayo Oil Company; The Meadville Corporation; Petroleum Marketing Corporation; Robert R. Cavin; Norman Goldberg; Charles J. Luellen; and W. H. Burnap,

Defendants.

INDICTMENT

The grand jury charges:

I.

DEFINITION

1. As used herein the term "Middle Atlantic states" means the states of New York, Pennsylvania, New Jersey, Delaware, Maryland and Virginia, and the District of Columbia.

II.

THE DEFENDANTS

2. The Society of Independent Gasoline Marketers of America (hereinafter "SIGMA") is hereby indicted and made a defendant herein. SIGMA, which is incorporated under the laws of the state of Missouri with headquarters at St. Louis, Missouri, is a trade association with members who are engaged in the retail marketing of gasoline.

3. The corporations named below are hereby indicted and made defendants. Each of said corporations is organized and exists under the laws of the state and has its principal place of business in the city indicated below:

Corporation	*State of Incorporation*	*Principal Place of Business*
Amerada Hess Corporation (hereinafter "Hess")	Delaware	New York, New York
Ashland Oil, Inc. (hereinafter "Ashland")	Kentucky	Ashland, Kentucky
Continental Oil Company (hereinafter "Continental")	Delaware	Stamford, Connecticut
Crown Central Petroleum Corporation (hereinafter "Crown")	Maryland	Baltimore, Maryland
Kayo Oil Company (hereinafter "Kayo")	Delaware	Chattanooga, Tennessee
The Meadville Corporation (hereinafter "Meadville")	New Jersey	Ardmore, Pennsylvania
Petroleum Marketing Corporation (hereinafter "PMC")	Delaware	McLean, Virginia

During all or part of the period of time covered by this indictment, and within five years preceding the return hereof, said defendants engaged in the business of marketing gasoline in the Middle Atlantic states.

4. Robert R. Cavin is hereby indicted and made a defendant herein. During all or part of the period of time covered by this indictment, and within five years preceding the return hereof, he was Executive Director of SIGMA.

5. The individuals named below are hereby indicted and made defendants herein. During all or part of the period of time covered by this indictment, and within five years preceding the return hereof, each was associated with one

of the defendant corporations in the capacity indicated below:

Individual	*Capacity*	*Corporation*
Norman Goldberg	Senior Vice President	Amerada Hess Corporation
Charles J. Luellen	Group Vice President	Ashaldn Oil, Inc.
W. H. Burnap	Executive Vice President	Continental Oil Company

III.

CO-CONSPIRATORS

6. Various corporations and individuals not made defendants in this indictment participated as co-conspirators with the defendants in the offence charged herein, and performed acts and made statements in furtherance thereof.

IV.

TRADE AND COMMERCE

7. Each of the defendant corporations is engaged in the retail marketing of gasoline in the Middle Atlantic states either directly or through company-owned and operated outlets or through dealers operating service stations under brands owned and controlled by the defendants. In addition, defendants Hess, Ashland, Continental, Crown and PMC sell gasoline at wholesale to other retail marketers operating in said area.

8. In terms of gasoline marketing in the Middle Atlantic states, the defendant corporations and their customer-marketers are known as "independents" who customarily sell gasoline through high volume, limited service outlets at prices several cents a gallon below the prices of the branded stations of the major oil companies.

9. The defendant corporations are the leading independent brand marketers in the Middle Atlantic states. In said area defendant Hess markets under the "Hess" brand;

Ashland under the "Red Head," "Payless," "Bi-Lo," "Hi-Fy" and "Rotary" brands; Continental and Kayo under the "Kayo" brand; Crown under the "Crown" brand; Meadville under the "Merit," "Save Way" and "Martin" brands; and PMC under the "Scot" brand.

10. The defendant corporations and their customer-marketers have accounted for a substantial portion of total gasoline sales in the Middle Atlantic states. During the period of time covered by this indictment, the total sales of gasoline through stations owned or controlled by the defendants amounted to approximately 17 billion gallons valued at approximately $4 billion.

11. During said period the defendant corporations sold substantial quantities of gasoline in a continuous and uninterrupted flow of interstate commerce to customers located in states other than the states in which such gasoline was manufactured and to customers travelling in interstate commerce.

V.

OFFENSE CHARGED

12. Beginning at least as early as 1967, the exact date being unknown to the grand jury, and continuing thereafter until November 1974, the defendants and co-conspirators engaged in a continuing combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended prior to December 21, 1974 (15 U.S.C. § 1), commonly known as the Sherman Act.

13. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise, maintain and stabilize the retail prices of gasoline.

14. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do including, among other things, the following:

(a) used SIGMA as a clearing house for gasoline pricing information in order to coordinate price increases and to eliminate discounts and settle pricing disputes;

(b) telephoned or otherwise contacted one another to exchange and discuss current and future retail gasoline prices;

(c) telephoned or otherwise contacted one another to coordinate price increases;

(d) telephoned or otherwise contacted one another to eliminate discounts in the form of price reductions or the granting of premiums;

(e) telephoned or otherwise contacted one another to police the agreement and secure adherence to agreed-upon increased prices; and

(f) met at the occasion of SIGMA meetings and discussed pricing strategy, including the coordinated increase of retail gasoline prices and the curtailment and elimination of price cutting and discount practices.

VI.

EFFECTS

15. The aforesaid combination and conspiracy has had the following effects, among others:

(a) prices of gasoline have been raised to and maintained and stabilized at artificial and non-competitive levels;

(b) buyers of gasoline have been deprived of free and open competition in the purchase of gasoline; and

(c) competition in the sale of gasoline among the defendants and co-conspirators has been restrained.

VII.

JURISDICTION AND VENUE

16. The aforesaid combination and conspiracy has been carried out in part within the District of Maryland within the five years preceding the return of this indictment.

Dated:

A TRUE BILL

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